Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

OMAR,

Petitioner,

-vs.-

GLORIDA BABCOCK, CINDY MORALES, BRUCE ROWLEY, and RAUL MORINGLANE, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Roy D. Wasson
Counsel of Record
WASSON & ASSOCIATES, CHARTERED
1320 S. Dixie Hwy, Suite 450
Miami, Florida 33146
(305) 666-5053

Karen A. Gievers
GIEVERS, P.A.
Suite No. 2
524 East College Avenue
Tallahassee, Florida 32301
(850) 222-1961

Attorneys for Petitioner

The Petitioner, Omar[1] by and through his next friend James P. Kelaher, petitions the Court to review a judgment of the Eleventh Circuit Court of Appeals and to answer the following questions in the affirmative:

QUESTIONS PRESENTED

I. Whether the express conflict between the circuits and several of the states' highest courts on the standard for imposing liability under section 1983 in child abuse cases merits this Court's acceptance of jurisdiction to resolve that conflict in favor of the more protective "professional judgment" standard, or the "deliberate indifference" standard used for prisoner cases?

II. Whether—if the Court applies the professional judgment standard to section 1983 cases brought by abused foster children—the evidence in the light most favorable to Omar satisfied that standard in this case?

III. Whether—if the Court adopts the deliberate indifference standard in section 1983 actions brought by abused foster children—the Eleventh Circuit's application of a purely subjective intent test for meeting the deliberate indifference threshold was erroneous as a matter of law?

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[1] Because the Petitioner Omar was an abused foster child (now age 19), he is identified in the style only by his first name to promote confidentiality. His full name appears in the "Parties to the Proceeding" section of this petition.

PARTIES TO THE PROCEEDING

The parties to this proceeding before this Court are, as identified in the caption of the case, the Petitioner (Appellant below), Omar Demetrius Davis, by and through his next friend James P. Kelaher, and the Respondents (Appellees below), Glorida[2] Babcock, Cindy Morales, Raul Moringlane, Jr., and Bruce Rowley.

Other individuals who were parties to the proceedings below, but who are not parties in this Court, include the former Defendants, Barbara Holmes, Joan Lindsey, Doris Malave, Joyce Setaro, and Janice Yahnke.

Because this petition is filed by an individual Petitioner, as opposed to a corporation, the provision of Supreme Court Rule 29.6 requiring a Corporate Disclosure Statement is inapplicable.

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[2] Ms. Babcock is also referred to as "Gloria" Babcock in various portions of the record.

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BASIS FOR JURISDICTION

The judgment on review is the final decision of the Eleventh Circuit entered on April 18, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1)(1988).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42U.S.C. § 1983 (1979) states:

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. JURISDICTION OF FEDERAL COURTS:

The district court had jurisdiction over this action brought under 42 U.S.C. § 1983 and removed from state court. *See* 28 U.S.C. § 1331 and 28 U.S.C. § 1441.

The summary judgment was entered on August 27, 2004. A notice of appeal was filed on September 22, 2004. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291.

B. STATEMENT OF THE FACTS:

The Plaintiff, Omar, is a nineteen-year-old male. Omar and his older brother Jamal came into the custody of the Florida Department of Children and Families ("DCF"), then known as

the Department of Health and Rehabilitative Services[3], in January 1988, when Omar was abandoned by his mother at the age of fourteen months. R.99. Since being taken into DCF custody and declared a dependent child—apart from the period when he was in the abusive foster and adoptive placement with Joanne Davis—Omar has been a ward of the State shuttled between institutional placements and temporary shelters throughout his entire life. R.115-11.

From November 1989 when he was not quite three years old, until June 1993 when he was six, Omar lived with Joanne Davis, with whom DCF employees including the Defendants had placed him. Omar suffered egregious abuse there, being beaten with hammers and high-heeled shoes; whipped with a looped belt severely enough to require hospital treatment; deprived of food and water for up to three days at a time; forced to eat his own feces; tied to a bedpost all night; locked in an animal cage; and more. As noted by the district court, "Defendants do not dispute that Plaintiff was the victim of severe abuse at the hands of Davis." *Omar III* at 1290.

Omar was initially housed in the "Bailey Emergency Shelter," until May 1988. In 1989, Omar's parents' parental rights were terminated. R.18-9; R.43-6. In November 1989, when Omar had reached three years of age, he was moved to the house of foster parent Joanne Davis.

DCF policies include the safety requirement that an Adoptive Home Study be performed before a child may be placed in a home for adoption. R.99-21, 23. No such study was performed in connection with Joanne Davis' adoption of Omar and Jamal. R.80-42-43.

There was an adoptive home study performed on August 4, 1988 prior to the planned adoption of Melissa, a girl. R.99-57.

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[3] For consistency that department will be referred to as "DCF" even when discussing events which occurred under its former name.

In February 1989, an addendum to the home study was prepared which related to the adoption of another girl named Vernetta. R.99-58.

The planned adoption of Melissa was not finalized. Davis requested that Melissa be removed from her home, as Davis could not control her. R.76-Ex.C (Bates 2648); R.79-51. Davis did not adopt Vernetta either. R.115-5.

Notwithstanding the lack of a home study in connection with Davis' adoption of Omar and his brother Jamal, those boys, along with an unrelated girl named Stephanie (later renamed Keisha) were approved for adoptive placement. R.115-5. Defendant/Respondent Bruce Rowley, the Adoptive Unit Supervisor who supervised the unit handling Omar's case, signed the Consent to Adoption of Omar and Jamal on behalf of DCF. Referring to the prior home study report done for the aborted adoptions of the girls, Rowley's form misleadingly stated: "a social study of the home of Joann Davis was made before said children were placed." R.79-45.

Defendant Rowley could not recall reviewing the 1988 report prepared for Melissa's placement with Davis prior to signing the Consent to Adoption of Omar. R.79-52. That 1988 home study report contained the following statement which indicated that Davis herself knew that she could not provide the level of care required by a very young child like three-year-old Omar: "Joann states she has experience taking care of younger children and does not wish to parent a younger child. Because of her age, she wishes to adopt an older child." R.76-19.

In addition to the lack of a required, child-specific Adoptive Home Study, there was evidence reflecting a lack of the minimal monthly caseworker visits after Omar was placed there and before the adoption was finalized. R.80-51, 61. Defendant/Respondent Glorida Babcock, the caseworker in the Adoptions Unit assigned to Omar's case, kept logged notes of some home visits to the Davis house for a period before the adoption was finalized. However, there is no record that she

performed a required home visit between November 28, 1990 and January 18, 2001. R.80-64. It was during that interval that doctors at Orlando Regional Medical Center's Arnold Palmer Hospital documented the new "looped lesions" and old signs of abuse on Omar's body which led to the first Abuse Hotline report. Ms. Babcock speculated that perhaps she did make such a visit, but did not note it. R.80-110.

While residing with Joanne Davis, evidence came to light which indicated that Omar had been subject to severe abuse. R.43-6. Omar, on more than one occasion, was brutally beaten with a belt, cord or other object by someone while in the pre-adoptive placement with Davis. R.93-87. It was uncontradicted that Davis either inflicted that abuse herself, or at the very least did not protect Omar from being abused by a sibling or someone else. R.93-53.

Omar was hospitalized several times during the fifteen-month interval between being moved to the Davis house in November 1989 and the adoption in February 1991. R.43-7. In March and December of 1990, Omar was hospitalized for seizures. R.76-36, 37. In a note made more than a month before the adoption, Defendant Babcock stated: "Omar continues to have seizures and the origin remains unknown."R.76-54.

The hospital record from December 21, 1990 reflects that he was admitted for treatment of pneumonia, and that "belt marks on his back were discovered which lead Dr. Villadiego to be suspicious of abuse." R.70-19. Davis claimed to be unaware of those marks until confronted by the hospital staff about them, and she "was unable to give an explanation of the marks at the time of admission." Three days later, Davis offered the explanation about another child in the house having struck Omar with an electrical cord. *Id.*

Dr. Fahy examined Omar's back, "documented the loop marks," and stated that Davis' claimed lack of knowledge of the marks prior to the physician visit was "worrisome." Dr.

Fahy also suggested that DCF examine the electrical cord allegedly used by the foster sibling to see if the history provided by Davis could be consistent with the visible injuries. *Id.*

Those belt marks were "looped," which is "one of the signs . . . specifically addressed in [DCF] child protection training" as an indication of child abuse, according to the deposition of Child Protective Investigator Karen Loomis; the looping of the belt indicates that the injuries were "inflicted." R.93-87.

Investigator Loomis found that "Omar, Keisha and Jamal Davis have been the victims of ongoing abuse from their adoptive mother since at least December of 1990 when belt marks were discovered on four-year-old Omar . . . ." R.93-53, 54. Ms. Loomis found that Ms. Davis had forced Omar to eat his own feces when he soiled his pants, and recommended that the "case will be closed, proposed confirmed for the maltreatments of confinement, bizarre punishment, medical neglect, other physical injury, inadequate supervision, other mental injuries, conditions hazardous to health, excess corporal punishment and beatings." R.93-50. She testified the nature of the abuse made the case "especially memorable" among her many investigations over her years with DCF. R.93-98.

Karis McDuffie, another child adopted by Davis, corroborated the abuse perpetrated by Davis, including depriving the children of food, denying Omar water, and hitting Omar with various objects, including a belt, a shoe and a hammer. R.90-2.

Ms. McDuffie linked the "seizures" for which Omar was hospitalized to the abuse Davis was inflicting upon him during the months prior to the adoption. The affidavit states: "I don't think he went to the hospital for 'seizures'; she made him have these seizures." R.90-2. Ms. McDuffie stated: "A lot of times, she did not give Omar water or anything else to drink. . . . Omar had to be taken to the hospital several times because Joanne Davis would not let him have anything to drink and he would get dehydrated." R.90-1-2.

The facts pertinent to the individual Defendants include the following:

Raul Moringlane:

The Defendant Raul Moringlane was employed by DCF as a Child Protective Investigator assigned to investigate the report of Omar's abuse in December 1990. R.78-5. The district court made the following findings concerning the sufficiency of evidence that Moringlane had actual knowledge of abuse to Plaintiff by Davis:

> Based on the record, the Court finds that Defendant Moringlane did have actual knowledge of a risk of child abuse to Plaintiff by Davis. Moringlane received in some manner a report of suspected child abuse of Plaintiff in December of 1990. From the contents of the written report, Moringlane knew that Plaintiff had loop marks on his back and buttocks. Therefore, Moringlane had actual knowledge that Plaintiff could have suffered abuse from a third person, including Davis.

R.115-30.

Cindy Morales

The Defendant Cindy Morales was supervisor of caseworker Glorida Babcock in the DCF adoptions unit, when Omar was placed in the Davis house. R.99-32. Ms. Morales testified that a separate home study must be done pursuant to DCF policy for each prospective adoptive child. R.99-21. The responsibility for performing that home study is initially that of the unit counselor assigned to the case. R.99-42. However, Ms. Morales agreed that if the unit counselor failed to perform the home study, the unit supervisor bore ultimate responsibility for that failure. R.99-43. She agreed that such a study is important to the safety of the adoptive child. R.99-23.

Ms. Morales served as chairperson of an Administrative Review Conference on the Plaintiff's case which was held on

September 12, 1990. R.99-38. That meeting, like all meetings at DCF regarding children, had as a priority the goal of making sure that the children were safe. R.99-39. By the time of that conference, Omar had been hospitalized several times for seizures and dehydration.

Bruce Rowley

Mr. Rowley signed reports during 1990 on behalf of the adoptions supervisor, Ms. Morales, which documented Omar's hospitalization for seizures. R.79-55. He attended an Administrative Review conference on September 12, 1990 at which the topics included Omar's medical history of seizures. R.79-55-59. Another report he signed on November 28, 1990 documents Omar's seizures. R.79-60.

Rowley also would have been aware of the December 1990 abuse report, under usual DCF procedures to inform those involved, as established by the affidavit of Linda Radigan, former DCF Assistant Secretary. R.91-11, 12. DCF records from June 23, 1993 stated: "Omar in hospital way too much for dehydration [in] 1990, drinking out of the toilet when she wouldn't let him have anything to drink." R.79-69. Mr. Rowley testified that he "probably did" have knowledge about those hospitalizations for seizures and dehydration when he signed the Consent for Adoption. R.79-70. When shown the records of Omar's six hospitalizations in 1990 and 1991 (including those mentioning the belt marks and possible child abuse), all of which were prior to the date he signed the Consent to Adoption, Mr. Rowley stated: "The medical records that were in the file I would have reviewed." R.79-88.

Glorida Babcock

Ms. Babcock reviewed and spoke with doctors about the medical records that documented the looped belt marks on Omar's back and buttocks in December 1990 which led to the Child Protection Team report. R.80-113, 114.

Further evidence that Defendant Babcock knew about Omar's abuse, or at least the circumstances causing him

injuries and illnesses requiring hospital treatment as a result of neglect, is contained in the affidavit of Linda Radigan, former Assistant Secretary of DCF. Ms. Radigan, whose duties during her ten-year employment with DCF included being responsible for the Florida foster care system, stated:

> 22. Further, consistent with required practice and procedure, Defendant Moringlane testified that although he has no specific recollection about the investigation he did, he is certain that he followed procedure and proper practice in letting the ARS personnel including the then-counselor (Babcock) and the then-supervisor (Rowley) know about the abuse allegations. Defendant Morales also admitted in her deposition (p. 73) that she was certain that protective investigators approaching an investigation ". . . would be in communication with whoever is involved in the abuse, especially services." They would certainly notify those other people who were involved so that everyone involved in the case would have that information. . . ."

R.91-11-12.[4]

Linda Radigan's affidavit contained numerous examples of the failure of the Defendants to use professional judgment in connection with their placement of Omar in the Davis house and their failure to protect him from the risk of harm that was obvious in that house. "Contrary to requirements and good practices" applicable to DCF foster care and adoption personnel, the Defendants did not exercise judgment in

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[4]Although the district court struck six paragraphs of Ms. Radigan's affidavit (on the ground that her opinions that the Defendants were deliberately indifferent to the risk to Omar were legal conclusions and impermissible comments on the mental state of others), the quoted portions were not stricken.

important areas including "no exploration of the reasons for the disruption and dissolution of the prior adoption" of Melissa; "no assessment of Joann[Davis]'s financial means to care for three children, despite [evidence of] financial hardship;" failure to make any "assessment of Joann's work requirements," in disregard of "requirements established to protect the safety of the children." R.91-6. The Defendants failed to utilize their judgment as professionals to make "any evaluation of the special needs of each of these three children;" and the result of such failures to use professional judgment "increased the risks of harm to all of the children put into the Davis house that Fall, including Omar." *Id.* at pp. 6-7.

Ms. Radigan's affidavit also establishes that the Defendants did not use their professional judgment in dealing with the visible injuries and illnesses revealed when Omar was hospitalized on various occasions after being beaten and starved. *Id.* at 12-14. Instead, the Defendants ignored their duties as professionals to make the sort of analyses and assessments required under DCF practices, resulting in further injury—physical, mental and emotional—being inflicted on the helpless child.

C. COURSE OF PROCEEDINGS AND DISPOSITIONS:

This lawsuit was filed in September of 2002 in a Florida state court of general jurisdiction in Orange County. R.2. That complaint named nine Defendants, Joan Lindsey, Glorida Babcock, Barbara Holmes, Doris Malave, Cindy Morales, Raul Morninglane, Jr., Bruce Rowley, Joyce Setaro, and Janice Yahnke. R.2-1. The Defendants filed a notice of removal and the case was removed to the U.S. District Court for the Middle District of Florida. R.1-1.

The Defendants filed a motion to dismiss Plaintiff's complaint, raising the doctrine of qualified immunity, alleging that the complaint failed to meet the heightened pleading

requirement applicable in the Eleventh Circuit to a § 1983 civil rights claim against individual defendants[5], asserting that the complaint failed to state a cause of action upon which relief can be granted, and raising lack of subject matter jurisdiction. R.2-1-3. That motion was mooted by the Plaintiff's filing of an amended complaint, removing claims against Joyce Setaro. R.18. The Defendants then filed a motion to dismiss the Plaintiff's amended complaint.

That motion was denied on January 14, 2003. *Omar v. Lindsey*, 243 F. Supp. 2d 1339 (M.D. Fla. 2003). Applying the procedure for addressing the qualified immunity defense set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the district court first found that there was a constitutional violation alleged in the amended complaint similar to that in *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987):

> According to the complaint, Plaintiff was brutalized with, inter alia, beatings, persistent malnourishment, dehydration, neglected illness, mace, and being bound. The depravity of this abuse plainly brings Plaintiff's case within the ambit of the *Taylor* doctrine, and the Court concludes, therefore, that the complaint satisfactorily pleads a fourteenth amendment violation.

Omar I, 243 F. Supp. 2d at 1343.

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[5] Thirteen years after this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), the Eleventh Circuit continues to recognize such a standard in cases against individual defendants entitled to qualified immunity. *See Swann v. Southern Health Partners, Inc.*, 388 F.3d 834, 838 (11th Cir. 2004)(rejecting heightened pleading standard in cases against entities not entitled to raise qualified immunity defense, but reaffirming that standard in cases against individuals).

The district court next addressed the sufficiency of the Plaintiff's allegations that the Defendants were deliberately indifferent to known risks. The district court judge found that "Plaintiff's complaint does not allege mere negligence. . .[but] adequately pleads the elements of deliberate indifference as enunciated by *McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999)." 243 F. Supp. 2d at 1344.

Next, the district court turned to the portion of the *Saucier* analysis which involves the question whether the Plaintiff's constitutional right which was denied by Defendants' conduct was "clearly established." Following this Court's holding in *Hope v. Pelzer,* 122 S. Ct. 2508 (2002), that a right may be clearly established even though no prior court decision involved the exact same factual circumstances, the district court held that Omar's rights involved in this case were clearly established by *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).

Next, the district judge addressed the "heightened pleading requirements" which exist in the Eleventh Circuit in cases brought under section 1983. After addressing the tension between customary federal notice pleading standards with the need to protect potential defendants in section 1983 cases, the district court concluded, "[u]pon careful consideration," that the Amended Complaint satisfied the heightened pleading standard, in that "the Court was able to ascertain the nature of each claim and evaluate whether its allegations were sufficient to overcome the qualified immunity threshold." *Id.* at 1346.

Finally, the district court considered the Defendants' argument that Omar's claims were barred by the statute of limitations. The motion was denied on that ground. *Id.* at 1347.

The Defendants perfected an appeal from the order denying their motion to dismiss. The Eleventh Circuit swiftly affirmed that order, holding that the Complaint sufficiently alleged constitutional violations under section 1983 actionable against the Defendants, and holding: "The gravamen of the allegations

is that these individuals knowingly and deliberately ignored the physical, mental and emotional harm being caused this child by the intentional infliction of known cruel and unusual punishment which shocks the conscience of any reasonable person." *Omar II*, 334 F.3d 1246, 1246 (11th Cir. 2003). The Eleventh Circuit court adopted the reasons set forth in the district court's opinion in *Omar I*.

Following remand to the district court, the Defendants filed a series of motions for summary judgment. R.59, 68, 71, 73, 75, and 77. The Plaintiff filed his own motion for partial summary judgment on the statute of limitations defense. R.109. By Joint Stipulation and Agreed order, the Plaintiff dropped his claims against Defendants Lindsey, Holmes, Malave, and Yahnke.

Judge Fawcett, in an order entered on August 27, 2004, struck much of the affidavit of Plaintiff's expert, Linda Radigan, and granted summary judgment for the Defendants on the qualified immunity issue. *Omar IV*. In its order granting summary judgment to the Defendants on qualified immunity grounds, the district court concluded that there was insufficient direct or circumstantial evidence that the Defendants knew that Omar was being abused, or deliberately disregarded a known risk of abuse by Davis, or at the hands of Davis, prior to the date his adoption by Davis was finalized. R.115-32, 34, 39, 45. Plaintiff timely filed an appeal on September 22, 2004. R.117.

On April 18, 2006, the Eleventh Circuit affirmed that district court's order granting summary judgment on qualified immunity to the Defendants. *Omar V*.

The court's decision began with an analysis of the knowledge element of deliberate indifference, which is the subject of this petition.

> The record contains no evidence that appellees knew of a risk of serious harm to Omar. To be deliberately indifferent, an official must not

> only be aware of facts suggesting a substantial risk of serious harm to the plaintiff, but ***the official must also draw the inference that the plaintiff is likely to be harmed***. See *Ray*, 370 at 1083 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). The record contains evidence that, prior to Omar's adoption, he had some documented illnesses, he displayed evidence of psychological problems, and on one occasion, his doctor discovered loop marks on his body. ***There is no evidence, however, that any of the appellees actually drew the inference that these facts meant Omar was being abused by Davis***.

Omar V, 2006 U.S. App. LEXIS 9704 at *13. The court did not address Plaintiff's argument that the Defendants were deliberately indifferent to a known risk of harm arising from Davis' neglect of Omar, which allowed someone else to beat the child and otherwise harm him.

Next, the court found that "there is no evidence that any of the appellees' failure to conclude that Omar was being abused was anything other than an unfortunate miscue." *Id.* at *14. The Eleventh Circuit seemingly contradicted its own findings of no evidence while applying the deliberate indifference test. The court found that "on December 21, 1990, Omar was admitted to Arnold Palmer Hospital for treatment of pneumonia. Omar was examined by Dr. Villadiego, who discovered a series of loop marks on Omar's body. ***Dr. Villadiego was concerned that these marks might have resulted from abuse, and he informed DCF*** of his discovery." *Id.* at *7 (emphasis added).

ARGUMENT

I.

THIS COURT SHOULD RESOLVE THE EXPRESS CONFLICT BETWEEN THE CIRCUITS AND SEVERAL OF THE STATES' HIGHEST COURTS AND APPLY THE PROFESSIONAL JUDGMENT STANDARD IN SECTION 1983 CHILD ABUSE CASES

A. The Circuits and State Supreme Courts are Split on the Issue:

The Eleventh Circuit granted summary judgment in favor of the Defendant child welfare workers—who placed Omar in the abusive foster home and left him there to be horribly mistreated—applying the standard used in cases brought by convicted felons claiming Eighth Amendment violations against prison officials: "deliberate indifference." That standard is exceedingly difficult to satisfy because it incorporates a subjective mental state requirement requiring the plaintiff to prove facts that defendants invariably deny: actual knowledge that the foster child is likely to be harmed. "To be deliberately indifferent, an official must not only be aware of facts suggesting a substantial risk of serious harm to the plaintiff, but the official must also ***draw the inference*** that the plaintiff is likely to be harmed." *Omar V* at * 13. (emphasis added).

Several other circuits likewise apply the deliberate indifference standard in § 1983 cases brought by abused foster children against child welfare workers. *Jordan v. Jackson*, 15 F.3d 333, 341 (4th Cir. 1994); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981). Still other circuits apply a standard borrowed from cases brought by involuntarily committed mental patients: the "professional

judgment" standard. *Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d 883, 893-94 (10th Cir. 1992); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990).

There also is a serious split between the highest courts of several states concerning the appropriate standard to employ in 1983 cases brought by foster children. In *Braam v. State of Washington*, 81 P.3d 851 (Wash. 2003), the highest court of the State of Washington rejected the deliberate indifference standard in favor of the professional judgment standard. Likewise, in *Kara B. v. Dane County*, 555 N.W.2d 630 (Wisc. 1996), the Wisconsin Supreme Court rejected the deliberate indifference standard in favor of the professional judgment standard.

The legal scholars who have written on the issue understand the difference between the two standards:

> Unfortunately, in the absence of a Supreme Court ruling on the subject, a circuit split has developed regarding the level of state apathy that a plaintiff foster child must demonstrate before the abuse he suffered while in custody rises to the level of an unconstitutional violation of his right to safety. Some circuits, by adopting a "deliberate indifference" standard, have read the Constitution to provide a state with no legal duty to keep its foster homes safer than it keeps its prisons. Yet, by Supreme Court precedent, these "deliberate indifference" circuits must apply a much higher "professional judgment" standard of care to state-run institutions for mentally retarded adults. Other circuits have, more wisely, applied this more rigorous "professional judgment" standard to foster care.

Brendan P. Kearse, *Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 Colum. J.L. & Soc. Probs. 385, 386-87 (1996)(hereinafter "*Competing Constitutional Standards*").

This Court should grant certiorari and address the merits of which standard applies in cases of abused foster children suing child welfare workers under § 1983.

B. Effects of *DeShaney*, *Estelle* and *Youngberg*:

The current, confused state of the law applicable to claims by abused foster children results from the lower courts' efforts to apply principles articulated by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, this Court rejected a child's claim against the state for failing to protect him from abuse by his father, holding that the state's duty extended only to persons kept in state custody. *Id.* at 199-201. The Court relied heavily on two cases to address the parameters of the duty state actors owe to those in state custody: one case involving a convicted prisoner and another case involving an involuntarily committed mental patient:

> In *Estelle* v. *Gamble*, 429 U.S. 97 (1976), we recognized that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, *Robinson* v. *California*, 370 U.S. 660 (1962), requires the State to provide adequate medical care to incarcerated prisoners. 429 U.S. at 103-104. We reasoned that because the prisoner is unable "'by reason of the deprivation of his liberty [to] care for himself,'" it is only "'just'" that the State be required to care for him. *Ibid.*, quoting *Spicer*

v. *Williamson*, 191 N.C. 487, 490, 132 S. E. 291, 293 (1926).

* * *

In *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting, holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others. *Id.*, at 314-325; see *id.*, at 315, 324 (dicta indicating that the State is also obligated to provide such individuals with "adequate food, shelter, clothing, and medical care"). As we explained: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed--who may not be punished at all -- in unsafe conditions." *Id.*, at 315-316 . . . .

Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg* v. *Romeo, supra*, at 317 ("When a person is institutionalized -- and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist").

489 U.S. at 198-200(footnotes deleted).

In the years since *DeShaney*, several of the lower courts—including the Eleventh Circuit--have lost sight of the fundamental differences between injured prisoner cases brought under the Eighth Amendment, and Fourteenth Amendment cases involving due process violations of the right to personal safety of innocent plaintiffs like the mental patient in *Youngberg* and helpless foster children. One commentator on the split between the circuits has described the problem caused by the confusion of the two categories of cases as follows:

> While both *Estelle* and *Youngberg* established for the state an affirmative duty to protect individuals held in state custody, the two cases established different minimum levels of care. The result is a circuit split regarding which standard of care to apply in the context of foster children—the relatively lax standard applicable to prisoners, or the more rigorous standard applicable to involuntarily committed mental patients. Lower courts have not found it difficult to decide that indeed foster care is "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect," but they have been vexed by the question of what standard of liability this suggests. Penal incarceration gives rise to an affirmative duty to protect which is attended by a standard of liability known as "deliberate indifference." Institutionalization of mental patients gives rise to a similar affirmative duty to protect attended by a higher standard of liability -- the "professional judgment" standard. Having decided that foster care is custody under the *DeShaney* analysis, lower courts were then left unguided when choosing

which standard of care to apply: "deliberate indifference" or "professional judgment." ***Oddly, most of these courts' decisions are conspicuously devoid of an acknowledgment that they even had a choice of two possible standards or that disagreement exists among the courts.***

Which standard a circuit adopts is critical because, in reality, the enforceability of a right in large part determines the nature of the right itself. The right to safekeeping in custody could be rendered meaningless if, for example, plaintiffs were required to show that the state had in essence a mens rea of intentional disregard of the right to safety. The right to safekeeping in custody would then be effectively unenforceable.

Thus, the level of safety for foster children mandated by the Constitution depends as a practical matter on the standard of liability to which the state is held when a child sues for abuse. ***Foster children residing in a circuit that has found foster care more analogous to incarceration discover that the Constitution guarantees them a very minimal level of safety, while foster children residing in a circuit that has found foster care more analogous to involuntary institutionalization discover that the same Constitution guarantees them a much higher level of safety.*** This is because Estelle, a prisoners' rights case, was based on the Eighth Amendment and will not hold the state responsible for poor oversight of its foster homes unless the plaintiff foster child can show that the state actor had a highly

> culpable state of mind. This creates a weak duty to protect foster children. In contrast, *Youngberg*, a case involving the abuse of an involuntarily committed mental patient, found that the standard of liability was based on substantive due process analysis under the Fourteenth Amendment, and thus it set a much lower state-of-mind requirement. This creates a strong duty to protect children.

Competing Constitutional Standards, supra, at 392-94 (emphasis added and footnotes deleted).

C. Public Policy Favors Adoption of Professional Judgment Standard in Child Abuse Cases:

The split between the circuits has continued to widen as the years pass by. Legal scholars have been calling for this Court to address the conflicting standards that render it nearly impossible for an abused foster child to recover against a state child welfare worker: "Since the *DeShaney* decision in 1989, the Supreme Court has denied certiorari in cases brought by foster children to enforce constitutional rights. The continued conflict between the circuits, and the perpetuation of legal discourse addressing the issue of state agency liability for violation of foster children's constitutional right to safety, advance the need for resolution by the Supreme Court." Christine M. Dine, *Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children's Right to Safety,* 38 Cal. W. L. Rev. 507, 515 (Spring 2002)(footnotes deleted).

Under the professional judgment standard, in order to recover in a section 1983 action, the Plaintiff must prove that the defendant's action was such a "substantial departure from accepted professional judgment, practice, or standards as to

demonstrate that the person responsible actually did not base the decision on such a judgment. *Youngberg*, 457 U.S. at 323. That is the appropriate standard to apply where a helpless foster child such as Omar is at the mercy of state employees purporting to apply standards of professionalism in the field of child welfare to provide for their safety. The "deliberate indifference" test appropriate to preserve the more limited Eighth Amendment rights of convicted felons is not appropriate to protect the rights of dependent foster children. Public policy demands that the courts protect these children by adopting a standard requiring child welfare workers to exercise professional judgment, as opposed to immunizing them unless they are deliberately indifferent.

The Supreme Court of Washington in addressing this issue has held as follows:

> Accordingly, we hold that "deliberate indifference" is not well suited for analyzing the claims of the class. Foster children are entitled to a high standard. *Accord, Brian A.*, 149 F. Supp. 2d at 953-54. Something more than refraining from indifferent action is required to protect the innocents.
>
> The plaintiffs argue for the professional judgment standard of *Youngberg*, 457 U.S. at 323. . . . We find compelling reasoning of the Wisconsin Supreme Court, which found "that those entrusted with the task of ensuring that children are placed in a safe and secure foster home owe a constitutional duty that is determined by a *professional judgment standard*." *Kara B.*, 205 Wis. 2d at 158 (emphasis added). We agree. Foster children, because of circumstances usually far beyond their control, have been removed from their

> parents by the State for the child's own best interest. More often these children are victims, not perpetrators. ***Foster children need both care and protection. The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety.***
>
> * * *
>
> We hold that the appropriate culpability standard is the professional judgment standard, i.e., the exercise of professional judgment made in accord with accepted professional standards or practice. "

Braam, 81 P.3d at 859 (emphasis added).

The same public policy considerations underlay the Supreme Court of Wisconsin's decision to adopt the professional judgment standard in section 1983 cases brought by abused foster children in *Kara B. v. Dane County*, 555 N.W.2d 630 (Wisc. 1996). That court adopted the reasoning of this Court in the *Youngberg* case to distinguish the situation of a claim based on violations of substantive due process rights to Eighth Amendment claims brought by convicted prisoners:

> We agree that *Youngberg* is more closely analogous to claims involving foster children than *Estelle*. We also find compelling the argument that ***foster children should be entitled to greater rights than prisoners***. Accordingly, we conclude that the duty of public officials to provide foster children with a safe and secure placement is based on a professional judgment standard.

Id. at 638 (emphasis added).

The Tenth Circuit likewise noted the public policy considerations underlying providing greater protection to helpless foster children than to prisoners in its decision in *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992). That court held as follows:

> The compelling appeal of the argument for the professional judgment standard is that foster children, like involuntarily committed patients are 'entitled to more considerate treatment and conditions' than criminals. *Youngberg*, 457 U.S. at 321-22. . . . These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. The officials who place the children are acting in the place of the parents.

Id. at 895. The Seventh Circuit also applies the professional judgment test in foster child cases. *K.H. ex-rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). Other lower courts also have rejected the deliberate indifference standard in foster children cases, reflecting the public policy of providing greater protection to helpless children in state custody than to convicted felons. *E.g. Neiberger v. Hawkins*, 239 F. Supp. 2d 1140, 1149 (D. Colo. 2002); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991).

This Court should recognize the stronger public policy considerations in favor of a standard that protects foster children and adopt as a nationwide standard the professional judgment standard. Otherwise, helpless children will be treated worse than a convicted killer.

II.

IF THE PROFESSIONAL JUDGMENT STANDARD APPLIES TO SECTION 1983 CASES BROUGHT BY ABUSED FOSTER CHILDREN, THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF SATISFIED THE STANDARD, SO REVERSAL IS REQUIRED

The affidavit executed by the former head of DCF's foster care program, Linda Radigan, when taken in the light most favorable to the Plaintiff, creates a genuine issue of material fact as to whether the Defendants failed to meet the professional judgment standard. "Professional judgment" requires a child welfare worker to apply his or her education and training and to assess the factual situation at hand, in light of the applicable DCF policies and procedures. Linda Radigan's affidavit testimony that the Defendants' response to the situation was "contrary to requirements and good practices" applicable to DCF personnel is evidence that the Defendants did not exercise their professional judgment.

That affidavit establishes a failure to exercise the judgment of a professional in the Defendants' failure to "explor[e] . . . the reasons for the disruption and dissolution of the prior adoption" of Melissa; their failure to "assess[] . . . Joann [Davis]'s financial means to care for three children, despite [evidence of] financial hardship;" and their failure to make any "assessment of Joann's work requirements," in disregard of "requirements established to protect the safety of the children." R.91-6. The Defendants failed to utilize their judgment as professionals to make "any evaluation of the special needs of each of these three children;" and the result of such failures to use professional judgment "increased the risks of harm to all of the children put into the Davis house that Fall, including Omar." *Id.* at pp. 6-7.

Further, Ms. Radigan's affidavit establishes that the Defendants did not use their professional judgment in dealing with the visible injuries and illnesses revealed when Omar was hospitalized on various occasions after being beaten and starved. *Id.* at 12-14. Instead, the Defendants ignored their duties as professionals to make the sorts of analyses and assessments required under DCF practices, resulting in further injury—physical, mental and emotional—being inflicted on the helpless child. The evidence met the standard for overcoming qualified immunity that this Court should adopt in section 1983 cases filed by abused and neglected foster children. Therefore, the Eleventh Circuit's judgment should be reversed.

III.

IF THIS COURT DETERMINES THAT THE DELIBERATE INDIFFERENCE STANDARD APPLIES TO FOSTER CHILDREN'S CASES, DELIBERATE INDIFFERENCE SHOULD BE DEFINED USING AN OBJECTIVE STANDARD

Even if this Court should agree with those circuits that apply the deliberate indifference standard to section 1983 cases brought by foster children, this Court should reverse the Eleventh Circuit's decision on the ground that deliberate indifference was incorrectly defined by that court. Instead of applying a standard that allows state actors to avoid liability for constitutional violations by simply denying subjective awareness of the likelihood of harm to the plaintiff, this Court should define deliberate indifference to incorporate an objective standard applicable to others within the defendant's area of expertise. If no reasonable child welfare worker in the position of the defendants could have failed to recognize the risk of harm to the plaintiff in a given foster home situation, summary judgment should be denied even though the defendant

claims that she or he did not subjectively infer that the risk of harm was likely.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court held that prison officials who show deliberate indifference to a prisoner's serious illness or injury violate the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. Such a transgression gives rise to an action under 42 U.S.C. § 1983. This principle has been adopted and well established by the Eleventh Circuit. *See Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982).

One of the early cases under section 1983 in which the mental state issue was addressed is the Second Circuit's decision in *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981). That case, like others in the developing area of law, started by analogizing the Eighth Amendment prisoner abuse cases to the foster care situation. Unfortunately, the analogy was taken too far by the Eleventh Circuit in its development of the law in this area.

In *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), the Eleventh Circuit relied on the *Doe* case in establishing a section 1983 cause of action for children placed in abusive homes through the fault of foster care or adoptive services workers. Although the deliberate indifference standard in *Taylor* was borrowed from *Doe*, it appears that a more stringent application of the standard evolved in the Eleventh Circuit, apparently resulting from the proliferation of abused prisoner cases.

This heightening of the deliberate indifference mental state to the present requirement that a defendant consciously draw the inference that a child is going to be harmed is largely due to this Court's decision in *Farmer v. Brennan,* 511 U.S. 825 (1970) expounding on the *Estelle* deliberate indifference standard and characterizing it as a subjective test. To meet this standard, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Farmer*,at

837. Making a showing that an official actually knew of past abuse to a foster child, and has actually drawn the inference that a risk of further serious harm exists is often fatal to a section 1983 claim of Omar's sort.

In *Ray v. Foltz* and *McElligot v. Foley*, the Eleventh Circuit states that the test for deliberate indifference includes an objective element. "To establish deliberate indifference, plaintiffs must be able to allege (and prove at trial) that the defendant (1) was **objectively** aware of a risk of serious harm; (2) recklessly disregarded the risk of harm; and (3) this conduct was more than merely negligent. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)." *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004). However, the Eleventh Circuit actually uses the subjective test described by *Farmer*.

The deliberate indifference standard—if it is employed in child abuse cases—should be defined using an objective test of recklessness, rather than requiring proof that the defendant was certain that harm was inevitable. The court should consider objective factors where the obviousness of the likelihood of harm is abundantly clear, as it was here.[6] *Cf. Whitley v. Albers*, 475 U.S. 312, 320 (1986); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)(recognizing higher standard requiring intent to harm in cases requiring hurried judgments and need to restore or keep order).

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[6] Petitioner notes that the district court in *Omar IV* found "that Defendant Moringlane did have actual knowledge of a risk of child abuse to Plaintiff by Davis." R. 115-30. A child care professional armed with such "actual knowledge" should not be protected by the virtually-impossible requirement of proving that the defendant subjectively knew that further harm was likely to occur. Once the defendant denies drawing such an inference, all that is left is objective evidence. That should be enough to satisfy the test where the lives and safety of helpless foster children are at stake.

Foster care workers do have the ability to make unhurried and reflective judgments about placements. Moreover, they are not confronted with the need to maintain prison or public order in the face of competing obligations.

It was of some note to the *Farmer* Court that a prisoner could seek relief from a substantial risk of serious harm through an injunction. Children placed in foster care do not share this luxury. They are vulnerable, immature, and without advocates outside of the government officials who investigate and place them. The court rejected the argument that a subjective deliberate indifference test will unjustly require prisoners to suffer physical injury before obtaining court-ordered relief of objectively inhumane conditions. In the context of prisoners, the court appropriately rejected petitioner's argument on the grounds that "one does not have to await the consummation of threatened injury to obtain preventative relief." *Farmer*, at 845. This cannot be analogous to children in foster care systems for obvious reasons, particularly in this case where Omar was three years old at placement.

Also, the standard for prisoners must give due regard to "the unenviable task of keeping dangerous men in safe custody under humane conditions." Foster care placement or adoptive placement does not share this extra consideration of danger and keeping order in the prisons. Likewise, the State is not dealing with convicted criminals. These children are innocent.

The facts in this case satisfy the level of recklessness required to demonstrate objective deliberate indifference. Upon placement with Davis, Omar began having seizures along with a series of other medical problems. There is no evidence in the record that Omar had ever experienced a seizure prior to placement with Davis. He was hospitalized repeatedly for his medical conditions, which his foster sister's affidavit attributes to Joanne Davis' mistreatment. Gloria Babcock even made a notation that Omar was having seizures and indicated her awareness of his other medical problems. In spite of this

knowledge, her reports recklessly indicate that Omar was adjusting well to the foster family and his new environment.

The court goes on to state that there is "no evidence that any of the physicians who treated Omar suspected these illnesses resulted from abuse [prior to Omar's adoption]." This is in contradiction to the district court's findings and the evidence. In December of 1990, about one month before the approval of Omar's adoption, Dr. Villa Diego discovered old and new belt marks on Omar's back leading the physician to suspect abuse. Those looped marks were documented by Dr. Fahy at Arnold Palmer Hospital three days later, and he too expressed his worries especially regarding the responses given by Davis. Omar was not even interviewed concerning the belt marks. That conduct was objectively reckless, and the Defendants should not escape liability by claiming ignorance of the obvious.

In this case the cumulative effect of the officials' actions and inaction clearly satisfies the heightened culpability requirement, even if "deliberate indifference" is the applicable standard. At the very least, a jury issue was presented. This Court should grant this petition and resolve the conflicts between the circuits and the state supreme courts on this important issue.

CONCLUSION

This Court should grant the petition and resolve the important question of the mental state necessary to support a section 1983 action by an abused foster child.

Respectfully submitted,

By: _____

ROY D. WASSON
Florida Bar No. 0332070
Counsel of Record

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-15003

D.C. Docket No. 02-01063-CV-ORL-19-KRS

OMAR, by and through his
next friend James Kelaher,

Plaintiff/Appellant,

versus

GLORIA BABCOCK,
CINDY MORALES,
RAUL MORINGLANE, JR.,
BRUCE ROWLEY,

Defendants/Appellees.

Appeal form the United States District Court
for the Middle District of Florida

(April 18, 2006)

Before EDMONDSON, Chief Judge, ANDERSON, and FAY, Cicuit Judges.

PER CURIAM:

This is an appeal from the district court's grant of summary judgment in favor of appellees in a civil suit for damages under 42U.S.C. §1983. Appellant, Omar, was placed in the home of his adoptive mother Joann Davis by the Florida Department of Children and Families ("DCF"). He suffered abuse at the hands of his adoptive mother and now alleges that appellees, all at one time affiliated with Omar's case in DCF, were deliberately indifferent to the abuse that was occurring in Omar's home and therefore not entitled to a qualified immunity. The controlling issue in this case is whether appellees had actual knowledge of abuse, and whether appellees acted with deliberate indifference toward the abusive situation in appellant's household. We agree witht eh district court's ruling that the record contains insufficient evidence of deliberate indifference on the part of appellees.[1] We therefore affirm the summary judgment.

I. Background

Appellant, Demetrius Omar Jurineack ("Omar"), was taken into custody by the foster care unit of the Florida Department of Children and Family Services ("DCF")[2] on January 16, 1988, after he was abandoned by his birth mother. The events which Omar complains in this case occurred between November 1989 and June 23, 1993, and when he lived with his foster care,a nd

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[1] The district court entered a lengthy and detailed analysis of the evidence in this matter under date of August 27, 2004.

[2] At the time, it was called the Department of Health and Rehabilitative Services.

later adoptive mother, Joann Davis. However, the events described below begin with Omar's first placement afgter he was taken into custody of DCF.

Omar was first placed temporarily with Joyce Bailey ("Bailey"). Omar's brother, Jamaal, was also taken into custody in January 1988, and the two boys were placed in separate shelter foster homes while the foster care counselor attempted to locate relatives who could care for them. The record reflects that in April of 1988, Bailey reported that Omar was jealous, fought with other children, and was a "monster". Omar was then placed in a shelter home with Vassie Wiggins ("Wiggins"). Wiggins reported that Omar cried frequently, undressed himself during the night, refused to sleep with his pajamas on, was afraid of strangers, and had a withdrawn personality. She stated that his sleeping habits could explain his continued congestion. In September of 1988, Wiggins expressed concern about Omar's continuous water consumption and suspected that he might be diabetic.

In November of 1989, Omar was placed by DCF in the foster care of Joann Davis ("Davis"). Appellee, Gloria Babcock ("Babcock") was the DCF adoption counselor assigned to Omar's case. Babcock had met Davis previously during a training session which prepared foster parents to care for special needs children. Prior to Omar's placement, Davis had been a foster parent to a 13-year old girl named Melissa. Melissa had been sexually abused, thus, Davis was required to attend the special training in order to foster her. Melissa's placement did not work out and Melissa was ultimately removed from the home.

Babcock conducted a home study, completed on August 4, 1988. The study reflected that Davis had experience taking care of younger children, but that at the time she fostered Melissa, Davis did not wish to parent a younger child. In addition, DCF obtained three reference letters for Davis, all of which were positive. An investigation of her employment and her level of

income indicated that she had adequate life and medical insurance, her marital status was verified, the home visit indicated that the living arrangements were appropriate, a physician's report indicated normal physical findings, and finally, abuse registry and police checks indicated that she did not have a criminal history or a history of abuse.

Davis later advised Babcock that she would like to adopt a younger child, Vernetta. Although she expressed a commitment to Melissa, who remained in counseling for sexual abuse suffered prior to her placement, Davis also felt that parenting Melissa did not give her the nurturing experience she could get from parenting a younger child. Babcock conducted a second adoptive home study on February 3, 1989. Babcock obtained three references for Davis since Melissa had been placed with her, and each stated that Davis was an excellent parent who was capable of parenting two children. Police and abuse registry checks again came back negative. Babcock concluded that Davis had demonstrated that she was capable of caring for both children.

Davis later contacted DCF in May of 1989 requesting that Melissa be removed from her home. Apparently, Melissa had been acting out sexually, and Davis felt Melissa had disrespected her church by taking a boyfriend into the back of the church. Davis also reported that Melissa was talking back and would not obey. The adoption counselor offered counseling, as no placement for Melissa was immediately available. The record indicates that Melissa and Davis were trying to work out their differences, however, Melissa ultimately left the Davis home.

In June of 1989, with Babcock acting as the adoption counselor, Omar was placed in the Davis home along with his brother, Jamaal, and an unrelated girl renamed Keisha. No home study for this placement has been identified in the record, however, Babcock remained in regular contact with Davis and Omar over the fourteen months she was assigned to his case.

The record indicates that in sum, Babcock conducted home visits with Davis and the children in March, April, May, August, September, October, and November of 1990, and in January of 1991. The reports from her home studies indicate that in general, the children were doing well, that they remained in counseling, and that the family members were adjusting well to living with each other. Babcock noted that Davis had difficulty finding after hours care for the children. She also noted that Omar had been hospitalized for seizures and that he was referred to CMS on May 7, 1990.

On September 12, 1990, DCF officials Gloria Babcock, Cindy Morales ("Morales"), and Bruce Rowley ("Rowley") attended an Administrative Review Conference. The conference report indicated that DCF intended to follow through on Davis' adoption of Omar. In December of 1990, a suspicion that Omar had been abused was raised and documented in a Child Protection Team Report ("CPT report"). Specifically, on December 21, 1990, Omar was admitted to Arnold Palmer Hospital for treatment of pneumonia.[3] Omar was examined by Dr. Villadiego, who discovered a series of loop marks on Omar's body. Dr. Villadiego was concerned that these marks might have resulted from abuse, and he informed DCF of his discovery. Later that same day, Child Protection Team Case Coordinator Bubba Martin spoke with Davis, who said that she had not noticed the marks on Omar until Dr. Villadiego pointed them out. At the time, Davis could not explain where the marks came from. However, when Davis spoke with Dr. Fahy, a Child Protection Team physician, on December 24, 1990, Davis reported that the marks were caused when Omar's 11-year old brother hit him with an electrical cord.

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[3] Apparently this was Omar's second visit to the hospital in December, as he was admitted earlier that month following a seizure.

DCF assigned appellee Raul Moringlane, Jr. ("Moringlane") to investigate Omar's alleged abuse. Moringlane testified that he had no independent recollection of the case, which was assigned to him some thirteen years before his testimony. However, Moringlane conjectured that, because the DCF report regarding this incident could not be found, the report must have considered the allegations "unfounded" based upon Moringlane's investigation. Moringlane testified that "unfounded" reports were routinely destroyed at the time he would have investigated Omar's case.

In January of 1991, Babcock conducted another home visit to the Davis home and found that Davis and the children were doing well. Appellee, Bruce Rowley ("Rowley"), the Adoptions Supervisor, subsequently signed a Consent to Adoption dated January 16 1991. Davis adopted Omar on February 28, 1991, along with his biological brother and an unrelated girl.

The following evidence of abuse to Omar in the Davis home came to light after his adoption in February of 1991. On October 24, 1991, a report of child abuse in the Davis home was made to the Florida Protective Services System. The report was closed without classification. In December of 1992, Davis filed a Missing Persons report when the three children left home. In January of 1993, two reports of child abuse in the Davis home were made to the Orlando Police Department, one on January 14, 1993 and again on January 29, 1993.

On February 11, 1993, the Children's Home Society referred Omar to Lakeside Alternatives, Inc. for a psychological evaluation. During the evaluation, Davis said that Omar was obstinate, lied frequently, drank out of the toilet, and stole food. He was having behavioral problems in school and had difficulty controlling his anger. On one occasion, he had attempted to stab his eight-year-old sister. The psychological evaluation stated that Omar was depressed and emotionally deprived, and it recommended counseling for Omar and Davis. The report contained no reference to child abuse.

On May 4, 1993, another report of child abuse in the Davis home was made to the Florida Protective Services System. On June 23, 1993, Omar and his two siblings were removed from the Davis home and placed in DCF shelter care. While in shelter care, the children revealed that abuse was ongoing in the Davis home since autumn of 1989. They said that Davis did not provide them with sufficient food and often left them alone at night. Other incidents included forcing the children to sleep in the garage, tying them to the bedpost, locking them in an animal cage, forcing them to eat feces and vomit, and hitting them. None of the parties dispute that there is evidence of abuse to Omar post-adoption.

Linda Radigan, a former DCF official, served as an expert witness for the plaintiff. Radigan worked at the Florida DCF central office from 1992 to 2002. Her affidavit alleges various deficiencies in the procedure followed in placing Omar with Davis. Radigan states that DCF officials failed to follow departmental policies.[4] She states that DCF failed to conduct a home study of the Davis home prior to Omar's placement, and that the files did not contain sufficient documentation to show how Omar and his brother were chosen for Davis. She further opines that DCF failed to train, evaluate, and prepare Davis to care for the three children. Radigan further testified that appellees missed signs of abuse, such as Omar's declining health, the loop marks found on his body, and the power struggles between Omar and Davis documented by Davis' psychologist, Dr. Freeman. She states that this information would have been conveyed to appellees Babcock and Rowley through routine DCF procedures. Finally, Radigan testifies that the observance of loop marks could not be classified as unfounded because even if one child was injured by another

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[4] Radigan does not cite to these policies or state when they were in effect.

child, the parent is still responsible for failing to protect the injured child.

Omar filed suit in district court on September 12, 2002, alleging that appellees Moringlane, Rowley, Morales, and Babcock violated *42 U.S.C. § 1983* by depriving Omar of his constitutional right to be free from unwanted abuse in his foster care and adoption placement with Davis. Appellees moved for summary judgment. They also moved to strike Radigan's affidavit, along with the depositions of Barbara Holmes, a DCF foster care specialist, and Joan Adkins Lindsey. The district court entered an order striking portions of the affidavit and granting the motion for summary judgment. Omar now appeals.

II. Discussion

We review a district court's grant of summary judgment *de novo*, viewing evidence in the light most favorable to the opposing party. *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005). The issue before us is whether appellant has provided sufficient evidence of deliberate indifference to defeat appellees' assertion of qualified immunity.[5] The appellees are

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[5] Appellant also argues that the district court erred by striking portions of an affidavit provided by plaintiff's expert, Linda Radigan. This argument is entirely without merit as the stricken statements contain legal conclusions as to whether appellants acted with deliberate indifference.

Federal Rule of Evidence 702 allows for the presentation of expert testimony, however, if the jury does not need the assistance of an expert to understand the case, or if the witness simply recounts the facts and then offers an opinion as to the conclusion which the jury should reach, such expert testimony is not permitted. See *Montgomery v. Aetna Casualty & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1991). Moreover, a plaintiff cannot rely on legal conclusions articulated by an expert to meet his burden of coming forward with relevant evidence. See *Avirgan v. Hull*, 932 F.2d 1572,

not subject to this damage suit unless the record contains evidence that they (1) actually knew of a risk of serious harm; (2) recklessly disregarded that risk of harm; and (3) their conduct was more than merely negligent. See *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004); see also *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987)("A child abused while in foster care, in order to successfully recover from state officials in a *Section 1983* action, will be faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home"). We conclude that the record contains insufficient evidence of deliberate indifference, and that the court's grant of summary judgment was appropriate.

The record contains no evidence that appellees knew of a risk of serious harm to Omar. To be deliberately indifferent, an official must not only be aware of facts suggesting a substantial risk of serious harm to the plaintiff, but the official must also draw the inference that the plaintiff is likely to be harmed. See *Ray*, 370 F.3d at 1083 (citing *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). The record contains evidence that, prior to Omar's adoption, he had some documented illnesses, he displayed evidence of psychological problems, and on one occasion, his doctor discovered loop marks on his body. There is no evidence, however, that any of the appellees actually drew the inference that these facts meant

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1577 (11th Cir. 1991).

As the district court noted, Radigan was not qualified as an expert on the state of mind of others. Several paragraphs of her testimony stated conclusions such as, "the defendants consciously disregarded known signs of abuse," and "absence of the required planning... demonstrates reckless disregard." Thus, we find no error in the court's decision to strike the portions of Radigan's testimony which contain legal conclusions as to another person's state of mind.

Omar was being abused by Davis. In fact, the only evidence is to the contrary.[6] Moreover, there is no evidence that any of the physicians who treated Omar suspected these illnesses resulted from abuse. Appellees would therefore have no reason to suspect otherwise. Thus, there is no evidence that appellees actually knew or even suspected that Omar was being abused prior to his adoption by Davis.

There is also no evidence that appellees recklessly disregarded a risk of harm to Omar or acted in a manner that was more than merely negligent. "Deliberate indifference is not the same thing as negligence or carelessness," *Ray*, 370 F.3d at 1083. Moreover, mere failure to follow DCF policy by gathering certain information does not rise to the level of deliberate indifference. See *Id.* at 1084-85. Instead, the plaintiff is required to provide evidence that the defendants deliberately disregarded actual knowledge of abuse. *Id.*

There is no evidence that any of the appellees' failure to conclude that Omar was being abused was anything other than an unfortunate miscue. The fact that Moringlane may have determined incorrectly that Davis was not abusing Omar is insufficient to support a finding of deliberate indifference. Moreover, Babcock's possible failure to conduct a home study prior to Omar's placement with Davis does not rise to the level of deliberate indifference. Babcock is not certain whether she actually conducted the home study in question, and the study is not in the record. The record does show, however, that Babcock was familiar with the Davis household, that she maintained regular contact with the family, and that she conducted studies of the Davis home on several other occasions while Omar was

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[6] According to Moringlane's testimony, the report of a suspicion that Davis was abusing Omar was determined "unfounded." There is no evidence that anything other than an unfounded report was filed.

under her supervision. There is no evidence that Babcock suspected at any point that Davis was abusing Omar, that she deliberately disregarded a known risk to Omar, or that she deliberately failed to learn of his abusive situation. Thus, even assuming that Babcock was required to conduct a home study specific to Omar prior to his placement and that she failed to do so, her failure to follow that particular DCF policy would not amount to deliberate indifference.

As for appellants Morales and Rowley, they had only supervisory authority over the situation and therefore had a more limited view of Omar's situation. The only information to which they potentially had access was Babcock's reports and the December 1990 CPT report. Since neither Babcock nor Moringlane indicated any suspicions of abuse to their supervisors, they would have no reason to believe otherwise given their lack of direct contact with the Davis household. Moreover, Morales and Rowley cannot be implicated based solely upon their supervisory authority. See *Miller v. King*, 384 F.3d 1248, 1261 (11th Cir. 2004)("It is well established in this circuit that supervisory officials are not liable under §1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior")(internal quotations and citations omitted). Thus, there is insufficient evidence that Morales and Rowley acted with deliberate indifference with regard to the appellant.

III. Conclusion

As noted by the district court, Omar's history is indeed a tragedy, and one that begins at a very young age when he was first abandoned by his birth mother. The likelihood that Omar was abused by his adoptive mother, Davis, is truly an unfortunate circumstance. However, this is a case about whether or not the officials in charge of Omar's well-being while he was in foster care acted with deliberate indifference toward a situation which they knew to be an abusive one, and

the answer to that is no. Appellant has not met the burden of showing that appellees acted with deliberate indifference. There is simply no evidence in the record that any of the appellees actually considered Omar's situation in the Davis home to be an abusive one prior to his adoption, or that they deliberately disregarded any knowledge of abuse to Omar. We therefore affirm the district court.

AFFIRMED.

OMAR, by and through his next friend,
KEVIN CANNON, Plaintiff,

vs.

JOAN LINDSEY, GLORIA BABCOCK,
BARBARA HOLMES, DORIS MALAVE, CINDY
MORALES, RAUL MORINGLANE, JR.,
BRUCE ROWLEY, and JANICE YAHNKE, Defendants.

CASE NO. 6:02-CV-1063-ORL-19KRS

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

243 F. Supp. 2d 1339; 2003 U.S. Dist. LEXIS 6580

January 14, 2003, Decided

Background

In his lengthy complaint, Plaintiff, a minor child, alleges that at age fourteen months he was placed in inappropriate foster care by Defendants, all of whom were at all relevant times employees of the State of Florida's Department of Children and Families ("DCAF"). He also alleges that Defendants permitted him to be adopted by an abusive parent. He claims that Defendants' gross dereliction of duty as officers of the state resulted in a childhood of unremitting and intense abuse, often what can only be described as outright torture. Indeed, the complaint depicts plainly criminal maltreatment, from beatings to the unconscionable use of tear gas on children. Plaintiff has brought suit against Defendants in their individual capacities under the fourteenth amendment, arguing that they

collectively violated his constitutional right to reasonably safe foster and adoptive care.

Standard of Review

For the purposes of a motion to dismiss, the Court must view the allegations of the complaint in the light most favorable to Plaintiff, consider the allegations of the complaint as true, and accept all reasonable inferences therefrom. *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1532, 1534 (11th Cir. 1994); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). Furthermore, the Court must limit its consideration to the pleadings and written instruments attached as exhibits thereto. *Fed R. Civ. P.* 10(c); *GSW, Inc. v. Long County, Ga.*, 999 F.2d 1508, 1510 (11th Cir. 1993). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Analysis

1. Qualified Immunity

Defendants, all of whom are being sued in their individual capacities, raise the defense of qualified immunity. They aver that Plaintiff had no "clearly established" right to be free of the sort of abuse he endured because the only relevant foster care case, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), concerned different, albeit similar, facts. Defendants contend, in other words, that they were on notice only that it is constitutionally wrongful to allow a foster mother to bludgeon her foster child into a permanent coma, which is what happened in *Taylor*. *Taylor*, they argue, did not forewarn them that they would be liable when, with deliberate indifference, they stood by while Plaintiff's foster mother whipped him, starved him, left him chronically dehydrated, gassed him with mace,

neglected his severe illnesses (inflicted by her abuse), tied him up like a farm animal, and forced him to live squalidly in animal filth. In raising this defense, Defendants urge the Court to give qualified immunity doctrine its most expansive possible interpretation, arguing that civil servants will be unwilling to undertake their often difficult and vital work unless they have the protection of robust immunities. Doc. No. 23, 2.

The Supreme Court has held that a qualified immunity analysis consists of two distinct strands. First, the Court must evaluate the complaint to determine if its allegations, assuming they are true, plead a cognizable violation of the constitution. See *Saucier v. Katz,* 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If this is answered in the affirmative, the Court pursues the second inquiry, which is to determine whether the right in question was clearly established. *Ibid.* This is not, however, a broad rumination on the law. Instead, it is a careful examination of the facts at hand, one that asks "whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Id.* at 202. See *Wilson v. Layne,* 526 U.S. 603, 615, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999) (stating that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

A. Was There A Constitutional Violation?

The pleadings do allege a constitutional violation. [1] There is no question that foster children have a fourteenth amendment liberty interest in physical safety, including a freedom from the sort of shocking abuse Plaintiff endured. See *Taylor* at 794-

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[1] The analysis of whether a constitutional right was violated applies to all Defendants equally. In the interest of brevity, the Court has chosen not to analyze each count against each defendant individually.

795. The facts of *Taylor* are similar to the allegations in the instant case. County and state officials removed a toddler from her natural parents and placed her with a foster mother. While in the foster home, however, the child was subjected to such merciless abuse at the hands of her guardian that she was left comatose. The Eleventh Circuit reasoned that foster care was analogous to involuntary custody in a state mental institution, which had previously been held by the Supreme Court to be a setting that implicates the fourteenth amendment. See *Youngberg v. Romeo,* 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). The maltreatment of a foster child, in other words, violates his or her constitutional rights if, had the maltreatment in question occurred in a traditional custodial context such as a prison or mental facility, it would have violated an inmate's rights. According to the complaint, Plaintiff was brutalized with, *inter alia,* beatings, persistent malnourishment, dehydration, neglected illness, mace, and being bound. The depravity of this abuse plainly brings Plaintiff's case within the ambit of the *Taylor* doctrine, and the Court concludes, therefore, that the complaint satisfactorily pleads a fourteenth amendment violation.

Liability will attach, however, only if the unconstitutional injuries were proximately caused by the deliberate indifference of officials to known risks. Omissions or nonfeasance, in other words, can only be the predicates for liability if officials fail with deliberate indifference to fulfil a statutory or other duty to act. *Taylor* at 796. The complaint in the instant case repeatedly alleges that Defendants knew that Plaintiff was being egregiously abused and time after time did nothing to rescue him.[2] Furthermore, contrary to Defendants contention,

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[2] Defendants argue that Plaintiff's complaint is ambiguous with respect to when Defendants learned of the abuse, failing to state that Defendants knew of the abuse while it was occurring. While the

Plaintiff's complaint does not allege mere negligence, which, Defendants correctly point out, does not offend the Constitution. Instead, it adequately pleads the elements of deliberate indifference, as enunciated by *McElligott v. Foley,* 182 F.3d 1248 (11th Cir. 1999). Assuming the facts in Plaintiff's complaint to be true, it is beyond doubt that the deliberate indifference of Defendants to Plaintiff's continuing peril was a proximate cause of his injuries, thereby transforming his foster mother's criminal abuse into a constitutional tort for which state actors may be held liable.

B. Was The Right In Question Clearly Established?

As suggested earlier, the mere fact that *Taylor v. Ledbetter* establishes that foster children have a liberty interest in being free of harsh abuse does not correlatively mean, with no further analysis, that this right was "clearly established" at the time in question.[3] The Court must examine the complaint's factual

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Court agrees that this is a crucial material fact for this litigation to resolve, it is not something that Plaintiff needs to prove or allege with unreasonable specificity in his complaint. At the motion to dismiss stage, this sort of factual ambiguity, to the extent that it even exists, must be construed in Plaintiff's favor.

[3] Defendants suggest in their memorandum that *Taylor* cannot be used as the basis of a qualified immunity analysis because the Eleventh Circuit explicitly noted that its opinion does not address the applicability of a qualified immunity defense. Doc. No. 23, p. 10. It does not follow from what the appellate court wrote, however, that *Taylor* would have been decided differently had the defendant in that case asserted a qualified immunity defense, and, therefore, that *Taylor* can never be used in a case in which the defendant invokes qualified immunity. *Taylor* simply stands for the proposition that foster children have a fourteenth amendment liberty interest in safe and secure foster care. The question of qualified immunity is

allegations and determine whether reasonable officers in the position of Defendants would have understood that their conduct violated a clearly established right.

Defendants assert that they are entitled to qualified immunity unless the allegations in the instant case are essentially indistinguishable from the facts of *Taylor*. They contend that Eleventh Circuit decisional law has repeatedly emphasized that a government actor does not have adequate notice that her conduct is wrongful unless precedent with an identical fact-pattern has unambiguously declared it to be so. Doc. No. 23, pp. 7-13. Unsurprisingly, this stringent test was satisfied only in the rarest of circumstances, and § 1983 litigants in the Eleventh Circuit have generally found qualified immunity to be a nearly insuperable obstacle.

This, however, is no longer the law. Last spring, the Supreme Court handed down a decision that clarifies how a court is to determine whether a particular right was "clearly established" for the purposes of a qualified immunity analysis. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the Supreme Court overruled the Eleventh Circuit, holding that its exacting qualified immunity doctrine was too strict. In *Hope*, an Alabama prisoner sued three prison guards in their individual capacities, alleging that they violated his eighth amendment right to be free of cruel and unusual punishment when they left him handcuffed to a metal pole for hours with neither water nor respite. Even though it concluded that this abhorrent maltreatment indeed violated the eighth amendment, the Eleventh Circuit granted summary judgment to the guards on the ground that they were not on notice that such conduct was unconstitutional because circuit precedent had never addressed this specific fact-pattern.

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adjudicated under an entirely different line of cases.

In considering this decision, the Supreme Court ruled that salient cases like *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974), furnished the guards with sufficient notice even though the facts in *Gates* were not perfectly congruent with the facts in *Hope.* This analytical flexibility reflects a deeper elaboration of what the Supreme Court meant in *United States v. Lanier,* 520 U.S. 259, 271, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997) when it wrote that "general statements of the law are not inherently incapable of giving fair and clear warning." The germane issue in a qualified immunity analysis, in other words, is not whether there is factually identical precedent [**11] but, instead, whether "in light of preexisting law the unlawfulness [of the alleged conduct is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); see also *Mitchell v. Forsyth,* 472 U.S. 511 n. 12, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (stating that a governmental actor is not necessarily protected by qualified immunity just because the specific conduct in question has not previously been declared unconstitutional).

Plaintiff's fourteenth amendment right to be physically secure was "clearly established" at all relevant times. *Taylor* established the proposition that foster children have a liberty interest, pursuant to the substantive due process clause of the fourteenth amendment, in physical safety. It is absurd to argue that the facts of *Taylor,* with its whirlwind of violent abuse, insufficiently notified Defendants that the sort of willful indifference at the heart of this case was unconstitutional. Indeed, it taxes the powers of the Court's imagination to fathom what would violate the constitution if not deliberate indifference to the gruesome and unfettered torture of a helpless little boy like Plaintiff. Defendants, in essence, are in the awkward position of arguing that even though they were idle while Plaintiff was subjected to obscene abuse, including being maced and starved, they would have stepped in had the mother begun to pound him into a permanent coma because, after all,

beating toddlers into a coma is what the constitution, as explicated by *Taylor*, prohibits.

As the Supreme Court explained in *Hope*, however, our constitutional jurisprudence is not so bereft of good sense and flexibility that decisions in one case do not apply under similar but nevertheless different facts in another. Assuming the factual allegations of Plaintiff's complaint to be true, the Court concludes that Plaintiff had a "clearly established" right not be brutalized the way in which he alleges he was, and, therefore, that Defendants cannot assert a defense of qualified immunity at this stage.

2. Does the Complaint Meet the Heightened Pleading Requirements of a § 1983 lawsuit?

Despite the lenience of the Federal Rules of Civil Procedure, it is axiomatic that defendants remain entitled to know exactly what claims are being brought against them. See Fed R. Civ. P. 8 & 10. Where the specter of frivolous or retaliatory litigation is high, courts sometimes impose heightened pleading requirements to ensure that potential defendants are not deterred from engaging in socially beneficial activity. Such is the case with § 1983. As Defendants point out, the Eleventh Circuit requires § 1983 plaintiffs to fulfill a higher standard of specificity in their complaints. See *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir) (citing *Arnold v. Bd. of Educ.*, 880 F.2d 305, 309 (11th Cir. 1989); *GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("Some factual detail in the pleadings is necessary ... in cases involving qualified immunity, where [the Court] must determine whether a defendant's actions violated a clearly established right.").

While mindful of this standard, the Court finds as a matter of law that Plaintiff's complaint satisfactorily pleads what is required. Defendants argue that Plaintiff's complaint evinces

three defects that courts have repeatedly condemned. First, Defendants contend that Plaintiff simply alleges the violation of general or abstract constitutional rights. Doc. No. 23, p. 13. This, however, is not true. Plaintiff specifically alleges that each Defendant violated his fourteenth amendment liberty interest, as articulated by *Taylor,* to have a physically secure environment while in foster care. Second, Defendants claim that Plaintiff's conclusory allegations "render it nearly impossible for the district court to conduct the 'fact-sensitive' examination of controlling caselaw required by qualified immunity." Doc. No. 23, p. 14. Whatever ambiguities might arise in more complex cases, the Court did not encounter any inordinate problems in determining that the allegations of the instant case fell within the compass of *Taylor.* Finally, Defendants argue that Plaintiff's "vague and conclusory allegations render nearly impossible the task of assessing how the qualified immunity defense applies to *each* individual defendant, as the district court is required to do." *Ibid.* Given that the constitutional claim against each Defendant is framed as a separate count, the Court was able to ascertain the nature of each claim and evaluate whether its allegations were sufficient to overcome the qualified immunity threshold. Upon careful consideration, the Court concludes that each count alleges a cognizable constitutional violation of a clearly established right under the substantive due process clause of the fourteenth amendment.

3. Has the Statute of Limitations Expired?

The applicable statute of limitations in a § 1983 lawsuit is the four-year Florida state statute of limitations for personal injuries. See *Wilson v. Garcia,* 471 U.S. 261, 276, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985) (stating that state statutes of limitations for personal injuries govern § 1983); *Baker v. Gulf & Western Industries, Inc.,* 850 F.2d 1480, 1482 (11th Cir. 1988) (stating that Fla. Stat. Ann. § 95.11(3) provides for a

four-year limitations period for personal injuries). Defendants argue that virtually all of the allegedly unconstitutional conduct in the complaint occurred between 1989 and 1991, well outside the scope of the four-year period. As with all statutes of limitations, however, this one is subject to various exceptions, which toll its running. The salient question, therefore, is whether any applicable tolling provision applies.

It would be premature to dismiss the complaint because the applicable statute of limitations has run. While it is proper to grant a Rule 12(b)(6) motion if noncompliance with the statute of limitations is apparent on the face of the complaint, such is not the case here. See, e.g. *Bethel v. JendocoConstr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978). Both parties set forth fact-intensive reasons why the motion to dismiss on the basis of the statute of limitations should be granted or denied. Plaintiff argues that he was only recently aware that Defendants are responsible for his injuries, and that the relevant statute of limitations was thereby tolled until he made this discovery. Plaintiff also argues that Defendants concealment of their nonfeasance hampered the ability of Plaintiff to learn the full truth of what happened to him. Defendants, on the other hand, argue that Plaintiff ceased to be in their custody once he was adopted in the early 1990s, thus extinguishing their constitutional responsibility for him. They also contend that none of the alleged torts were intentional, which precludes Plaintiff from invoking the expansive statute of limitations for abuse victims under Fla. Stat. Ann § 95.11(7). [4] In keeping

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[4] Defendants assert that Fla. Stat. Ann. § 95.11(7), which establishes a generous statute of limitations for the victims of childhood abuse, does not apply because Plaintiff's complaint does not allege any intentional torts. Doc. No. 23, pp. 18-19. Plaintiff does not raise the question of whether this statute provides him with any shelter so the Court declines to invoke it on his behalf, other

with the standard of review, the Court concludes that the statute of limitations issue cannot be resolved at this stage of the litigation because such resolution would depend either on facts not yet in evidence or on construing factual ambiguities in the complaint in Defendants' favor, which would be inappropriate.

4. Plaintiff's Additional Motions

Plaintiff has two additional motions pending. The first requested an enlargement of time within which to respond to Defendants' motion. Doc. No. 26. This motion is denied as moot. The second requested an opportunity for oral argument. Doc. No. 27. This motion is also denied as moot.

CONCLUSION

For the foregoing reasons, the Court rules as follows:

1. Defendants motion to dismiss (Doc. No. 22) is DENIED;
2. Plaintiff's motion for an enlargement of time (Doc. No. 26) is DENIED;
3. Plaintiff's motion for oral argument (Doc. No. 27) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 14th day of January, 2003.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

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than to remark that the Court has already found that Plaintiff alleged "deliberate indifference" by Defendants to his grave predicament (without "deliberate indifference" there would be no constitutional violation). This "deliberate indifference" satisfies the state statutory definition of abuse. See Fla. Stat. Ann. § 39.01.

OMAR, by and through his next friend,
Kevin Cannon,

Plaintiff-Appellee,

versus

JOAN LINDSEY,
GLORIA BABCOCK, et al.,
Defendants-Appellants.

No. 03-10594 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

June 26, 2003, Decided
June 26, 2003, Filed

DISPOSITION: Affirmed.

COUNSEL: For Lindsey, Joan, Babcock, Gloria, Holmes, Barbara, Malave, Doris, Morales, Cindy, Moringlane, Raul Jr., Rowley, Bruce, Yahnke, Janice, Appellants: Smith, Peter N., Gurney & Handley, P.A., ORLANDO, FL.

For Omar, Appellee: Gievers, Karen A., Attorney at Law, Tallahassee, FL. Wasson, Roy D., Attorney at Law, Miami, FL.

JUDGES: Before DUBINA, MARCUS and FAY, Circuit Judges.

OPINION: PER CURIAM:

This is an interlocutory appeal from the denial of a motion to dismiss on the grounds of qualified immunity. The suit is filed on behalf of a child removed from his mother by personnel of the Florida Department of Children and Families. The complaint alleges constitutional violations under 42 U.S.C. § 1983 against these individuals. The gravamen of the allegations is that these individuals knowingly and deliberately ignored the physical, mental and emotional harm being caused this child by the intentional infliction of known cruel and unusual punishment that shocks the conscience of any reasonable person.

The ruling of the district court denying the motion to dismiss is affirmed for the reasons set forth in its ORDER of January 14, 2003 which is attached as an appendix.

APPENDIX

OMAR, by and through his next friend, KEVIN CANNON, Plaintiff, vs. JOAN LINDSEY, GLORIA BABCOCK, BARBARA HOLMES, DORIS MALAVE, CINDY MORALES, RAUL MORINGLANE, JR., BRUCE ROWLEY, and JANICE YAHNKE, Defendants.

CASE NO. 6:02-CV-1063-ORL-19KRS

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

January 14, 2003, Decided

OMAR, by and through his next friend,
Kevin Cannon,

Plaintiff,

-vs-

JOAN LINDSEY, GLORIA BABCOCK,
BARBARA HOLMES, DORIS MALAVE,
CINDY MORALES, RAUL MORINGLANE, JR.,
BRUCE ROWLEY, JOYCE SETARO
and JANICE YAHNKE, each individually,

Defendants.

Case No.: 6:02-cv-1063-Orl-19KRS

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

2004 U.S. Dist. LEXIS 15510

July 30, 2004, Decided

OPINION: ORDER

This case comes before the Court on the following:

1. Defendants', Joan Lindsey, Gloria Babcock, Barbara Holmes, Doris Malave, Cindy Morales, Raul Moringlane, Jr., Bruce Rowley, and Janice Yahnke, Motion for Partial Final [sic] Summary Judgment on the Statute of Limitations (Doc. No. 59); Defendants', Joan Lindsey, Gloria Babcock, Barbara

Holmes, Doris Malave, Cindy Morales, Raul Moringlane, Jr., Bruce Rowley, and Janice Yahnke, Memorandum of Law in Support of their Motion for Partial Final [sic] Summary Judgment on the Statute of Limitations (Doc. No. 60); Plaintiff's Response to Motion for Partial Summary Judgment on the Statute of Limitations and in Response to the Defendants' Related Memorandum of Law (Doc. No. 64).

2. Defendants' Gloria Babcock, Cindy Morales, Raul Moringlane, Jr., and Bruce Rowley Motion for Partial Summary Judgment Based on *Deshaney v. Winnebago County* and Memorandum of Law in Support Thereof (Doc. No. 68); Plaintiff's Response in Opposition to Defendants' Combined Motion for Summary Judgment Based on *DeShaney* (Doc. No. 88).

Procedural History

On October 15, 2002, Plaintiff sued Defendants in their individual capacities alleging a deprivation of rights guaranteed by the fourteenth amendment. Doc. No. 18. Defendants promptly filed a motion to dismiss, arguing, *inter alia*, that they were entitled to qualified immunity. Doc. Nos. 22 & 23. This motion was denied and affirmed on appeal. Doc. Nos. 31 & 41. Following the close of discovery, the eight original Defendants filed a collective motion for summary judgment on the ground that Plaintiff's claims are barred by the statute of limitations. Doc. No. 59. This motion is presently before the Court.

Since that motion was filed, the parties stipulated to the dismissal of all claims against Defendants Holmes, Lindsey, Malave, and Yahnke. Doc. No. 65. The remaining four Defendants then collectively filed a motion for summary judgment contending that Plaintiff's claims are foreclosed by *DeShaney v. Winnebago County*. Doc. No. 68. This motion is also presently before the Court.

Along with the *DeShaney* motion, each of the four remaining Defendants individually filed motions for summary judgment on the ground of qualified immunity. Doc. Nos. 69, 71, 73 & 75. The Court will address those four motions in an order that will be forthcoming.

The Facts

The following is not a comprehensive summary of the record, just the facts necessary to resolve the two motions presently before the Court.

Plaintiff is a minor. He was born on November 24, 1986. Doc. No. 68, Ex. A. He was removed from the custody of his natural mother when he was still an infant. In November of 1989, he was placed in the foster care of Joann Davis. Doc. No. 78, Moringlane Depo., Ex. 37 "Predispositional Summary for Dependency." at 5. He was adopted by Davis, along with his biological brother and an unrelated girl, on February 28, 1991. Doc. No. 68, Ex. A. In the interval between his arrival in the Davis household and his adoption, there was evidence that Davis was mistreating her children. *See, e.g.*, Doc. No. 78, Ex. 37 (medical records of an exam conducted on December 21, 1990). The three children were removed from the Davis home on June 23, 1993. Doc. No. 78, Moringlane Depo., Ex. 37 "Predispositional Summary for Dependency." at 5. Defendant does not dispute that Plaintiff was the victim of horrible abuse at the hands of Davis.[1]

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[1] For example, as part of an investigation into the Davis household in the days leading up to the children's removal, they reported to an investigator of "being tied to a bedpost all night, having food and water withheld up to 3 days, being locked in an animal cage, forced to sleep in a dark garage alone, being tied together standing in Joann's doorway w/ their hands behind them all night, being forced to eat feces & vomit, being hit w/ fishing rod, hammer, frying pan, switch, shoes & sticks." Doc. No. 78, Moringlane Depo., Ex. 37, "Abuse Report" of Karen Loomis.

Standard of Review

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993)(citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

Legal Analysis

1. The Statute of Limitations

Defendants move for summary judgment on statute of limitations grounds under three distinct theories. First, a cause of action under section 1983 is subject to Florida's four-year residual personal injury statute of limitations, meaning that Plaintiff can recover only for wrongs committed the four years prior to the July 10, 2002 filing date of this lawsuit. Defendants

further argue that the tolling provisions do not apply even though Plaintiff was a minor because a Florida court appointed a guardian ad litem for him after he was removed from the Davis household. Doc. No. 60 at 3-6. Second, even if the limitations period is tolled because Plaintiff was a minor, the statute of repose bars any cause of action brought more than seven years after the tortious act. *Id.* at 6. Finally, Defendants contend that the special statute of limitations for cases involving the intentional abuse of minors does not apply because Joanne Davis, not Defendants, was the intentional abuser. *Id.* at 7-10.

While Defendants are correct that section 1983 claims must comply with the personal injury statute of limitations of the forum state, *Owens v. Okure,* 488 U.S. 235, 250, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989), Defendants fail to address the even more pressing question of when Plaintiff's claims accrued. The state statute of limitations only begins to run when the underlying claims have accrued, and accrual is a question of federal, not state, law. *Rozar v. Mullis,* 85 F.3d 556, 561 (11th Cir. 1996) ("Federal law determines when a federal civil rights action accrues.") (citation omitted). "The general federal rule is that 'the statute [of limitations] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Id.* at 561-562 (quoting *Mullinax v. McElhenney,* 817 F.2d 711, 716 (11th Cir. 1987)).

Plaintiff, who was born on November 24, 1986, was in the abusive Davis household between the ages of two and six. It is self-evident that Plaintiff could not possibly have been cognizant of his rights following his removal from Davis' custody. Furthermore, the Court will not impute to his then-Guardian ad Litem, Pamela Foels, the legal duty to investigate and bring a constitutional cause-of-action on his behalf. The unrebutted affidavit of Ms. Foels, supported by a copy of a June 24, 1993 state court order, indicates that she was appointed

Guardian ad Litem solely for the purposes of a dependency proceeding, not to litigate Plaintiff's tort claims lest they be extinguished by June 24, 1997, five months before his eleventh birthday. Doc. No. 64, Ex. 1, Foels Aff. P3.

The undisputed evidence demonstrates that the first serious effort by a fiduciary of Plaintiff to pursue legal remedies on his behalf began in February of 2000 when Plaintiff's counsel, Karen Gievers, wrote the Department of Children and Families to request records and notify it of potential claims.[2] *Id.*, Ex. 3, Gievers Aff. P9. Ms. Gievers struggled with the DCAF for nearly two years before it finally relinquished records germane to Plaintiff's time in the custody of his adoptive mother. The Court, therefore, concludes as a matter of law that Plaintiff's claims did not accrue for the purposes of Florida's statute of limitations until at least November of 2001 when Ms. Gievers finally obtained the records that form much of the factual basis of Plaintiff's constitutional cause of action.

The complaint in this case was filed within eight or nine months of the accrual date for Plaintiff's claims, well within Florida's four-year statute of limitations.[3] Accordingly,

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[2] Toward the end of their motion, Defendants argue, implausibly, that in the early 1990s Plaintiff "knew who his abuser was and what type of abuse took place." Doc. No. 60 at 10. More interestingly, they aver that "Omar Davis has been a plaintiff in lawsuits which alleged the *same* abuses complained of in this case." If true, this fact may have altered the Court's analysis. There is no way for the Court to know, however, because Defendants provided no evidence to support this statement.

[3] Even if the Court were to conclude that the accrual date was in early February of 2000 when Ms. Gievers began to correspond with the Department of Children and Families, the complaint in this case was filed within two years.

Defendants' motion for summary judgment on statute of limitations grounds is denied.

2. *Deshaney v. Winnebago County*

Defendants contend that their liability is precluded by the doctrine set forth in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). Doc. No. 68 at 3-4. In *Deshaney,* Joshua DeShaney, who as a four year old suffered catastrophic brain damage at the hands of his father, and his mother brought a section 1983 suit against the Winnebago County (Wisconsin) Department of Social Services ("DSS") and various employees individually because they failed to intervene when there was reason to suspect that Joshua was being abused by his custodial father. Winnebago County first learned of Joshua's situation when his father's second wife told police that the father was a child abuser. *Id.* at 191-193. DSS interviewed the father but pursued the case no further. *Id.* Over the course of the next two years, Joshua was in and out of the hospital with various injuries that his healthcare providers dutifully reported to DSS as indicative of abuse. *Id.* During this period, DSS left him in his father's custody despite mounting evidence, including the direct observation of head injuries by Joshua's caseworker, that he was being abused. *Id.* Joshua was hospitalized for the final time when his father beat him so severely that he was left with crippling brain damage. *Id.* The Supreme Court held that the substantive due process clause of the Fourteenth Amendment only serves to restrain the government from oppressing its citizens. *Id.* at 195 ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."). It does not impose upon the government a duty to protect one citizen from another. *Id.* ("[The Due Process Clause's] purpose was to protect people from the State, not to ensure that the State protected them from each other.").

Plaintiff's case is distinguishable from *DeShaney*.[4] The salient fact in *DeShaney*, which is not present in this case, is that neither Winnebago County nor its employees created little Joshua's predicament. Joshua was, so to speak, always in his natural and proper place. *Id.* at 262 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). It was simply a terrible misfortune that his place within the natural order was in the custody of a heinous man.

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[4] The Court will treat Defendants' motion for summary judgment on *DeShaney* grounds strictly as a question of law, not fact. Defendants, who cite only to adoption records, not their own depositions, apparently believe there is no construction of the facts in the record, even as Plaintiff would have them, that is not foreclosed by *DeShaney*. The basis of this belief is their contention that the only abuse Plaintiff suffered occurred while he was the adoptive child of Joann Davis between February 28, 1991 and June 23, 1993. Doc. No. 68 P3. This is clearly wrong because, as the Court noted in the preceding summary of the facts, there is evidence that Davis abused Plaintiff while he was still in her foster care.

In any event, in making this decision not to cite their own depositions, Defendants implicitly concede that, for the purposes of their *DeShaney* motion, their various states of mind in the period preceding the adoption, when Plaintiff was in Joann Davis' foster care, are not relevant. For the purposes of this summary judgment only, the Court concludes that Defendants do not contest Plaintiff's interpretation of the record, only the legal implications thereof. The Court will take up the question of Defendants' intent more closely and with much reference to the record, as Defendants themselves do, in the pending motions for summary judgment on the ground of qualified immunity.

Plaintiff, on the other hand, was not in his place in the natural order when he was being brutalized by his adoptive mother. His place within the natural order was with his natural mother. DCAF, however, removed him from his mother's care when he was still an infant. Indeed, DCAF stripped him of his liberty and rendered him utterly dependent on the beneficence of its employees and agents. It was this seizure and sequestration of Plaintiff that gave rise to a constitutional duty to act as his fiduciary. *Id.* at 199-200 ("when the State takes a person into its custody and holds him there...the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.") (citation omitted); ***Omar*** *v. Lindsey,* 243 F. Supp. 2d 1339, 1343 (M.D. Fla. 2003) *aff'd* 334 F.3d 1246 (11th Cir. 2003) ("The maltreatment of a foster child...violates his or her constitutional rights if, had the maltreatment in question occurred in a traditional custodial context such as a prison or mental facility, it would have violated an inmate's rights."). Having seized Plaintiff, Defendants then facilitated his adoption by a foster mother who posed a clearly foreseeable risk to his well-being. 489 U.S. at 200 ("when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e.g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by...the Due Process Clause."). When they did this, Defendants put Plaintiff in an unnatural and improper place, a place he would never have been but-for their intervention under color of state law. Consequently, at least under one interpretation of the facts, *DeShaney* would not apply.

Defendants, to be sure, are not without a point. If Defendants in good faith, or even with mere negligence, first placed Plaintiff in foster care with Joann Davis and then facilitated his adoption by her two years later, then *DeShaney*

would apply because Defendants would have acted at all times as constitutionally sufficient stewards of Plaintiff during the time they deprived him of his liberty. [5] *Omar*, 243 F. Supp. 2d at 1343 ("Liability will attach...only if the unconstitutional injuries were proximately caused by the deliberate indifference of officials to known risks.") (citing *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987)). If, however, Defendants first placed Plaintiff in foster care with Joann Davis and then facilitated his adoption by her, and they acted with deliberate indifference to grave and obvious risks, then their stewardship of Plaintiff's well-being did not adequately discharge the duty the constitution places on state actors when they assume control over a citizen's life. Thus, the crucial fact Plaintiff must establish at trial, and this issue will be addressed when the Court examines the pending motions for summary judgment on the ground of qualified immunity, is that Defendants exercised custodial control over Plaintiff while he was in foster care with Davis and they exercised this control with deliberate indifference to obvious dangers.[6]

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[5] Again, because the question of Defendants' intent is dispositive of the qualified immunity issue, the Court will examine Defendants' state of mind when it addresses the pending qualified immunity motions.

[6] Defendants' apparent position that DCAF employees could never be liable for injuries caused by an adoptive parent is absurd on its face. Suppose a DCAF caseworker, knowing that a prospective adoptive parent were a sexual predator, testified during an adoption proceeding that her investigation revealed no reason not to grant the adoption of a foster child in DCAF custody to the predator, and the judge, in reliance on this testimony, did so. Suppose further that the caseworker did this because she hated this particular child or just does not care one whit about what happens to

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment on the ground of the statute of limitations (Doc. No. 59) is DENIED.

Defendant's motion for summary judgment on the ground that liability is precluded by *DeShaney v. Winnebago County* (Doc. No. 64) is DENIED.

DONE and ORDERED in Chambers in Orlando, Florida this 30th day of July, 2004.

PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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children after they are adopted. *DeShaney* does not stand for the proposition that the state is free to seize children and then, through malice or deliberate indifference, actively work to place those children in the adoptive hands of predators and other dangerous deviants.

(2)

No. 06-78

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OMAR,

Petitioner,

v.

GLORIDA BABCOCK, CINDY MORALES, BRUCE ROWLEY, RAUL MORINGLANE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

JAMES M. KLOSS
Counsel of Record
RONALD L. HARROP
COONEY, MATTSON, LANCE, BLACKBURN, RICHARDS & O'CONNOR, P.A.
111 N. Orange Avenue
Suite 850
Post Office Box 4850
Orlando, FL 32801
(407) 843-2100

Counsel for Respondents

203444

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit was not presented with the issues raised in the Petition.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's Order granting summary judgment for Respondents does not conflict with a Court of Appeals or State Supreme Court decision because there is no meaningful distinction between the deliberate indifference and professional judgment standards.

III. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's rigorous analysis of Petitioner's evidence as it pertains to Respondents' qualified immunity defense demonstrates that summary judgment would have been granted under the professional judgment standard.

IV. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit correctly applied the deliberate indifference standard.

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INTRODUCTION

Petitioner/Plaintiff, Omar, has advanced no "compelling reasons" to grant his Petition for Writ of *Certiorari* ("Petition"). *See* Sup. Ct. R. 10. Plaintiff contends that the Eleventh Circuit should have utilized the professional judgment standard instead of the deliberate indifference standard in analyzing Respondents/ Defendants' qualified immunity defense and that there is a conflict among the circuits and state supreme courts concerning which standard to use in the foster care context. Alternatively, Plaintiff argues that the Eleventh Circuit incorrectly applied a purely subjective test in applying the deliberate indifference standard.

Plaintiff's argument that the professional judgment standard should be applied in foster care situations was never raised in the district court or the Eleventh Circuit. Prior to this Petition, Plaintiff never argued or suggested that any standard other than deliberate indifference should be applied. The Court ordinarily does not consider issues neither raised nor decided below.

Further, there is no meaningful distinction between the professional judgment and deliberate indifference standards and consequently, no "conflict" among the circuit courts and state supreme courts. Even if the Eleventh Circuit had applied Plaintiff's version of the professional judgment standard, however, the result would have been the same since the record is devoid of any evidence of abuse prior to Plaintiff's adoption

Finally, the Eleventh Circuit correctly defined the deliberate indifference standard, and that standard has not been defined differently by any other circuit. Plaintiff fails to point to any case in which a subjective component is not part of the deliberate indifference analysis. Moreover, although the deliberate indifference test permits the utilization of circumstantial evidence that the risk of abuse was obvious, the district court in this case emphasized the lack of evidence of abuse prior to adoption, circumstantial or otherwise.

As a result, Plaintiff has completely failed to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition, and the Petition should be denied.

STATEMENT OF THE CASE AND FACTS

This is an action under 42 U.S.C. § 1983 by Plaintiff/ Petitioner, a minor child at the time of filing, known by his first name of Omar, by and through his next friend, James Kelaher. Plaintiff alleges that the Defendants/Respondents, all current or former employees of the Florida Department of Children and Families ("DCF"), were deliberately indifferent to abuse that was occurring in the home of Plaintiff's adoptive parent, Joann Davis. Defendants deny that they were "deliberately indifferent" to Plaintiff's constitutional rights and contend that they were not aware of any information that would have led them to believe that Plaintiff was in danger of abuse. Further, Defendants contend that at the time of the alleged abuse, Plaintiff had been adopted by Joann Davis, and Defendants no longer had any involvement or responsibility for Plaintiff's case.

Neither Plaintiff's initial complaint nor his amended complaint alleged a violation of the "professional judgment standard." At no time during any of the proceedings before the district court or Eleventh Circuit did Plaintiff argue or assert that Defendants' conduct should be evaluated under the professional judgment standard, nor was the professional judgment standard employed or relied upon by the courts below.

Plaintiff was born on November 24, 1986. R.68, ex. A. In November of 1989, Plaintiff was placed in the home of Joann Davis for a pre-adoptive placement. R.99, Ex. 30, p. 6094. Ms. Davis had been married twice and was thirty-six years old when Plaintiff was placed with her. R.80-9. Adoption counselor Glorida Babcock handled Plaintiff's placement.

Glorida Babcock

Glorida Babcock was an adoption worker for DCF from 1987 until 1991. R.80-5. Ms. Babcock was assigned to Plaintiff

from June of 1989 until his adoption by Joann Davis was finalized in February of 1991. *Id.* at 35. The first home study Ms. Babcock conducted concerning the Davis home was in August of 1988, and was related to a thirteen-year old girl, Melissa. R.76, ex. A. The August 1988 home study noted that, although Ms. Davis had experience taking care of younger children, she did not wish to parent a younger child because of her age. *Id.* The home study reflects that three positive reference letters were obtained, an investigation of employment and income was made, marital status was verified, a physician's report was received, negative abuse registry and police checks were obtained and the home was visited and found to be appropriate. *Id.*

While caring for Melissa, Ms. Davis expressed interest in adopting a younger child, Vernetta, who was eighteen months old. R.76, ex. B. Ms. Davis was concerned that she did not have the chance to get the nurturing experience that is involved in the care of a younger child. *Id.* Another home study was done on February 3, 1989 – six months after the first home study – which focused on Ms. Davis' ability to care for a younger child. *Id.* Again, three positive references were obtained and, as the district court stated, all of the checks indicated that Ms. Davis "was an excellent parent, mature and capable of handling the parenting of two children." *Id.* at 5. Vernetta, however, was adopted by someone else. R.80-14.

Before the adoption of Melissa was completed, Ms. Davis contacted DCF and requested the removal of Melissa from her home. R.76, ex. C. The records reflect that Melissa had been acting out sexually. *Id.* After one incident in which Melissa was with her boyfriend "in the dark" in the back of the church, Ms. Davis told Ms. Babcock that Melissa did not respect her or the church. *Id.* Although Ms. Davis and Melissa attempted to work out their difficulties, Melissa ultimately left the home. R.80-7,8.

From her review of the records, Ms. Babcock believes that she placed Plaintiff in the Davis home in November of 1989 after a conference with her supervisor, Cindy Morales. R.80-9,10. She is not certain whether she conducted a home study that was specific to Plaintiff's placement, but she had already investigated Ms. Davis' ability to parent an older child in August 1988 and a younger child in February 1989. R.76, ex. A and B. Ms. Babcock testified that home studies need not be child specific. R.80-8. Further, Ms. Babcock was required to submit reviews to the juvenile court every six months. *Id.* at 44.

Plaintiff, his older brother Jamal and an unrelated girl, Keisha, were placed with Ms. Davis. R.99, Ex. 30, p. 6094. Ms. Babcock's notes reflect that she made regular visits to the home, documented problems that came to her attention and followed up on those concerns. R.76, exs. F, G, H. Each time "HV" is reflected in the Log of Contacts (ex. F), Ms. Babcock visited the Davis home. R.80-120. The Sharing Sheets (ex. G) are forms that are filled out in conjunction with home visits. R.80-121,122.

For the most part, Ms. Babcock noted that the Plaintiff was doing well. R.76, ex. F-H. Ms. Babcock documents that the Plaintiff was having some seizures and that follow-up care was provided by Children's Medical Society. *Id.* In her 4/16/90-7/31/90 log (ex. G), she reports that no neurologic dysfunction is noted. Ms. Babcock also responded to statements by Ms. Davis about feeling overwhelmed by initiating family counseling sessions and providing Ms. Davis with a "buddy parent", – a more experienced parent – to work with her. R.80-130. At some point, Ms. Davis stated that she no longer felt overwhelmed. *Id.* at 130-131. Plaintiff was also enrolled in 4C daycare, and Ms. Babcock communicated with the daycare center. *Id.* at 29, 99. The daycare center never reported that Plaintiff was being abused. *Id.* at 39, 126. None of the records generated by Ms. Babcock indicate any abuse or suspicion of abuse.

The only time that any suspicion of abuse was raised by anyone was in December 1990. R.76, ex. I. Dr. Villadiego, while examining Plaintiff for pneumonia, discovered marks on Plaintiff's back and buttocks. *Id.* Following a call to the abuse "hotline", Raul Moringlane, a protective investigator with DCF, was assigned to investigate the possibility that the marks were caused by child abuse (Mr. Moringlane's role will be outlined in more detail below). R.70, 78. According to the Child Protection Team (CPT) report, Ms. Davis told a CPT physician that Plaintiff's brother struck him with an extension cord from a deep fry. R.76, ex. I. Ms. Babcock testified that it is not uncommon for siblings to have rivalries in which incidents occur that are similar to the one described by Ms. Davis in the CPT report. *Id.* at 25. The CPT report further states that Mr. Moringlane will visit the home and examine the cord, and that Adoptive Services will arrange any services needed in the home. *Id.* The report states that Mr. Moringlane advised CPT that the Orlando Police Department would not be involved in the case due to "lack of supporting evidence that abuse occurred by a caretaker". *Id.* Mr. Moringlane testified that his abuse investigation determined that the report of abuse was "unfounded." R.78-13. He knows this because his abuse investigation report is no longer in the system and because unfounded reports are required to be expunged. *Id.* Ms. Babcock does not recall speaking with Mr. Moringlane. R.80-31.

Although Ms. Babcock does not recall the incident, she would have relied on Mr. Moringlane, as the protective services investigator, to make the determination of whether the incident was caretaker abuse. Since Mr. Moringlane did not conclude that the marks were the result of abuse, and since Ms. Babcock had seen no other indications of abuse, Ms. Babcock did not suspect that Plaintiff was at risk of being abused or that Plaintiff needed to be removed from the Davis home. *Id.* at 131. At the time of Ms. Babcock's final visit to the Davis home on January 18, 1991, four days after the CPT report was generated, there

was no indication or suspicion of abuse. R.80-131. Ms. Babcock stated that she was not concerned about Plaintiff's safety because she had no evidence that Plaintiff had been abused by Ms. Davis. R.80-129. She had no further involvement with Plaintiff after his adoption was finalized on February 28, 1991. *Id.* at 117.

The district court, in analyzing qualified immunity as it applies to Ms. Babcock stated:

> [k]nowledge of a suspicion of abuse, coupled with (1) personal knowledge of a positive adoptive home situation over an extended period of time, (2) regular contact with the child and the adopting parent, (3) regular interventions to provide support for the parent and the child and medical care for the child, (4) a report that reflects the DCF investigator found a lack of supporting evidence that the caretaker committed abuse of the child in the single incident alleged, (5) a failure to conduct a third home study when two prior home studies had been completed, regular home visits and telephone contacts were conducted, including one home visit after the date of the report of suspicion of abuse, and regular conferencing of the case with the adoption worker's supervisor occurred, (6) regular contact with and knowledge of the adopting mother from at least August of 1988 through February of 1991, the date of the child's adoption, and (7) knowledge of a prior placement of a sexually abused teenager that did not result in an adoption do not rise individually or collectively to the level of actual knowledge of abuse, or the risk thereof, or of deliberate indifference towards abuse or the constitutional right of Plaintiff to be safe.

Resp. App., p. 31a. (The district court's Order granting summary judgment is attached hereto as Respondents' Appendix).

Raul Moringlane

Raul Moringlane, Jr. is currently a Child Protective Investigator Supervisor at DCF. R.78-4. He has held that position since 2002. *Id.* at 4-5. Prior to that time, he was a Child Protective Investigator for approximately 17 years. *Id.*

The only involvement Mr. Moringlane had with the Plaintiff was in December of 1990, in his capacity as a Child Protective Investigator, and he has no independent recollection of the case. *Id.* at 6. Because he has no recollection of the case, Mr. Moringlane, at his deposition, relied on the CPT report from Arnold Palmer Hospital, dated January 14, 1991. R.76, ex. I; R. 70, ex. B. As discussed above, the CPT report indicates that Plaintiff was hit with an electric cord by his older brother, that Mr. Moringlane will visit the home and examine the cord, and that Adoptive Services will arrange any services needed in the home. *Id.* The report further states that Mr. Moringlane advised the CPT team members that the Orlando Police Department would not be involved in the case due to "lack of supporting evidence that abuse occurred by a caretaker". *Id.*

Although Mr. Moringlane does not have any recollection of the 1990 investigation, he testified that he would have visited the Davis home, spoken with Dr. Villadiego, and interviewed anyone with knowledge of the incident. R.78-10, 27, 24. Although his abuse investigation report was not found in the DCF computer system, Mr. Moringlane explained that "when cases come in and they have been classified as unfounded, my understanding is that they destroy the files and the report . . ." *Id.* at 12. Mr. Moringlane concluded that, ". . . based on the fact that there's no files or no record of [his findings from his investigation of the marks], my understanding would be, then, that the case must have been closed unfounded." *Id.* at 13.

Section 415.504, Fla. Stat. (1990), the version of the statute in effect at the time of the investigation, states: "[a]ll identifying information in the central abuse registry and tracking system or

other computer systems or records that is related to unfounded reports shall be expunged 1 year after the case is classified as 'unfounded.'" Whereas, "[c]omputer records of a confirmed report shall be retained for 50 years from the receipt date of the report." *Id.*

Mr. Moringlane testified that if a caretaker is responsible for the injuries, then the child may be removed from the caretaker. R.78-17. However, if a sibling inflicts the injury, other steps may be taken to protect the child. *Id.* at 18. In such a case, a DCF official would talk to the parent to ensure that the parent was aware of the problem and would supervise the children accordingly. *Id.* The caretaker may be instructed not to leave the children alone or to take actions to protect the child from the child causing the injury. *Id.* The proper course of action stems from the specific details concerning how the injuries occurred. *Id.* Mr. Moringlane had no further involvement with Plaintiff after he filed his report. R.78-38.

The district court found that, although Mr. Moringlane had knowledge of a risk of abuse, there was no evidence that he disregarded that risk. Resp. App., pp. 36a-37a. In performing his duties as a protective investigator, Mr. Moringlane came to the conclusion that no abuse by Ms. Davis had occurred. *Id.* The court points out the flawed reasoning of Plaintiff's argument that Mr. Moringlane was deliberately indifferent because he – in Plaintiff's opinion – came to the wrong conclusion. *Id.*

The court stated:

> [I]n short, Plaintiff's argument can be summarized as follows: First, belt-type markings on Plaintiff's body conclusively illustrates that abuse took place. Second, if Moringlane followed appropriate investigative procedures, then Moringlane would have discovered that Plaintiff was abused by Davis. Therefore, Moringlane's deliberate indifference can

> be inferred from the fact that in conducting the investigation Moringlane failed to conclude there had been abuse of Plaintiff by Davis.

Id. at 38a.

In a footnote, the court illustrated the dangers of Plaintiff's circular reasoning:

> Plaintiff's argument that the failure after investigation to find abuse when abuse actually occurred equals deliberate indifference towards the abuse would result in the articulation of a new standard under which public officials could be exposed to widespread liability. There may be instances where officials conduct a proper and appropriate investigation and conclude that there is no abuse, when abuse has in fact occurred. Without the requirement that Plaintiff must produce direct or circumstantial evidence pointing to subjective awareness of the abuse by the official and deliberate disregard of that risk by conduct that is more than mere negligence, the burden would rest on the public official to provide that he was not deliberately indifferent. Such standard, if adopted, would ultimately defeat the public policy reasons behind qualified immunity.

Id. at 38a, n.8.

Consequently, the court correctly held the following:

> . . . under the law once Moringlane has shown that he acted within the scope of his discretionary authority, it is the Plaintiff who must produce facts showing that Moringlane had actual knowledge that plaintiff was being abused or that Morninglane deliberately failed to learn of the abuse and disregarded the risk to Plaintiff by conduct that is more than mere negligence. Plaintiff has failed to

> point to any facts which illustrate that Moringlane failed to conduct a proper investigation. Plaintiff merely alleges that Moringlane failed to follow investigative procedures, but ...ere allegations are not enough to survive a motion for summary judgment.

Id. at 38a-39a.

Cindy Morales

Cindy Morales began working for DCF on November 13, 1978. R. 74, ex. A, par. 3. At the time Plaintiff was placed for adoption, Ms. Morales was an Adoptions Supervisor assigned to supervise Adoptions Counselor, Glorida Babcock. *Id.* at par. 7. Ms. Morales continued to supervise Ms. Babcock until July 23, 1990, when she was promoted to Programs Specialist. *Id.* Following her promotion to Program Specialist, she was no longer Ms. Babcock's supervisor and had no responsibility to supervise Ms. Babcock or any other Adoptions Unit counselor. *Id.* It was Ms. Morales' practice to meet with her adoption counselors on a monthly basis to review their cases. *Id* at par. 8. She would rely upon the adoption counselors to advise her of any problems or concerns. *Id.*

Ms. Morales stated that the adoption files relating to Plaintiff do not reflect that Ms. Davis had "psychological instability", "abusive tendencies", or would otherwise present a known danger to small children such as Plaintiff. *Id.* at par. 9. As to Ms. Davis' treatment of Plaintiff, Ms. Morales stated that the records do not reflect that Ms. Davis was "a dangerous, abusive or unfit parent at any time prior to the finalization of her adoption of Omar Davis." *Id.* at par 12. Ms. Morales has no knowledge of the December, 1990 investigation conducted by Mr. Moringlane because she was no longer involved with Plaintiff's case at that time. *Id.* at par. 20.

The district court found that "[t]here is no evidence of record that Morales had actual knowledge or subjective knowledge of a risk of child abuse to Plaintiff by Davis." Resp. App., p. 46a. The court noted that Ms. Morales relied upon Ms. Babcock to advise her concerning each child Babcock visited and reasoned that ". . . if Babcock had no knowledge of abuse, it follows that Morales could not have such knowledge, directly or subjectively, either." *Id.* at 43a.

Bruce Rowley

Bruce Rowley is currently a Court Liason for DCF, a position he has held for nine years. R.79-4. Mr. Rowley has been employed by DCF for approximately thirty-two years, beginning first as a Foster Care Counselor, then moving to the Adoption Unit as an Adoption Counselor, and then becoming an Adoption Supervisor. *Id.*

Mr. Rowley first became involved with Plaintiff's case in August of 1990, when he was promoted to the position of Adoption Supervisor. *Id.* at 5. At that time, he became Glorida Babcock's supervisor after Ms. Morales was promoted to Program Specialist. *Id.* When Mr. Rowley took over the Adoption Supervisor position, Plaintiff was already placed with Ms. Davis and the parental rights of the birth mother had been terminated. *Id.* at 6.

Mr. Rowley has no independent recollection of the Plaintiff, or his placement. *Id.* at 6. However, the records indicate Ms. Davis was approved as an adoptive parent prior to his promotion to Adoption Supervisor. *Id.* at 10. Mr. Rowley stated that a home study was previously prepared for the Davis home and it was not necessary to update or renew the home study before Plaintiff was adopted by Ms. Davis. *Id.*

Mr. Rowley was not responsible for conducting home visits, and the protective investigations unit was responsible for investigating any allegations of abuse. *Id.* at 10-11, 93. Thus,

Mr. Rowley relied upon the information provided by the counselor to make his determination concerning the adoption of a child. Mr. Rowley participated in an Administrative Review Conference on September 12, 1990, but does not recall what was discussed. *Id.* at 56. The conference was held to review the status of cases and to determine what services were needed. R.99-39.

Mr. Rowley has no independent recollection of Plaintiff being treated for bruises and dehydration, but would have looked into any and all information relayed to him, especially information regarding potential abuse. *Id.* Mr. Rowley testified that the medical background of Plaintiff would not necessarily delay an adoption, since children can be sick for a multitude of reasons, not necessarily as a result of abuse. *Id.* at 19-20. As for the bruises, he recalls reading in Plaintiff's file that the concerns regarding possible abuse were unfounded and that removal from the home was not warranted. *Id.* at 21. He maintains that he considered as much information as possible in determining the appropriateness of Plaintiff's placement in the Davis home. After Plaintiff's adoption was finalized, Mr. Rowley had no further involvement with Plaintiff. *Id.* at 18, 22.

The district court found that there is no evidence to support Plaintiff's contentions that seizures, dehydrations, hospitalizations, other medical issues, and aversions to baths are indications of child abuse. Resp. App., p. 51a. The court also found that there is no evidence that Mr. Rowley knew about the report of suspicion of child abuse in December of 1990 or the January 14, 1991 CPT report. *Id.* Moreover, the court held that, even if Mr. Rowley was aware of the December 1990 incident, "the CPT report does not reflect that abuse of Plaintiff by Davis had occurred." *Id.* at 52a. Thus, the court held that Mr. Rowley was entitled to qualified immunity because "Plaintiff has failed to produce evidence, either direct or circumstantial, that Rowley had actual knowledge of, or deliberately disregarded

by conduct that was more than negligent a serious risk of, child abuse suffered by Plaintiff at the hands of Davis." *Id.* at 53a.

Affidavit of Linda Radigan

In response to Defendants' Motions for Summary Judgment, Plaintiff filed the Affidavit of Linda Radigan. R.91. Ms. Radigan is a former DCF employee who formed the "expert opinion" that "each of the Defendants consciously disregarded known signs of abuse – physical or emotional – inflicted on Omar in the home of Joann Davis before the adoption was finalized in February, 1991." *Id.* at 1-2 Defendants filed a Motion to Strike the Affidavit of Linda Radigan and supporting Memorandum of Law R.105, 106. Defendants argued that the Radigan Affidavit was legally deficient because it contained legal conclusions, conclusions of fact and misstatements of facts. *Id.*

Ms. Radigan's testimony was stricken "insofar as that testimony contains conclusory legal statements as to the state of mind of Defendants." Resp. App., p. 54a. The court found that "[s]he is not qualified as an expert on the state of mind of others, nor is her testimony necessary for the jury to understand the facts of the case or to determine the ultimate question, whether the defendants acted with deliberate indifference." *Id.* at 55a. The court held that statements that included references to Defendants' "conscious disregard", "reckless disregard", "deliberate indifference" or "actual knowledge" would be stricken. *Id.* at 56a-57a. However, Ms. Radigan's testimony concerning "policies or procedures" of DCF was considered by the district court. *Id.* at 57a.

In his Petition, Plaintiff repeatedly cites the Radigan Affidavit for the proposition that the Defendants failed to utilize their professional judgment. However, there are absolutely no references to "professional judgment" in the Radigan Affidavit. R.91.

Eleventh Circuit Opinion

Plaintiff appealed the final judgment in favor of the Defendants and the Eleventh Circuit affirmed the district court's decision. Pet. App. A-1. The Eleventh Circuit stated the following:

> There is no evidence that any of the appellees' failure to conclude that Omar was being abused was anything other than an unfortunate miscue. The fact that Moringlane may have determined incorrectly that Davis was not abusing Omar is insufficient to support a finding of deliberate indifference. Moreover, Babcock's possible failure to conduct a home study prior to Omar's placement with Davis does not rise to the level of deliberate indifference. Babcock is not certain whether she actually conducted the home study in question, and the study is not in the record. The record does show, however, that Babcock was familiar with the Davis household, that she maintained regular contact with the family, and that she conducted studies of the Davis home on several other occasions while Omar was under her supervision. There is no evidence that Babcock suspected at any point that Davis was abusing Omar, or that she deliberately failed to learn of his abusive situation. Thus, even assuming that Babcock was required to conduct a home study specific to Omar prior to his placement and that she failed to do so, her failure to follow that particular DCF policy would not amount to deliberate indifference.

Id. at A-10,11. As for Defendants Rowley and Morales, the Eleventh Circuit found that they only had supervisory authority and, since neither Babcock nor Moringlane indicated any suspicions of abuse, they would have no reason to believe otherwise. *Id.* at A-11. The Eleventh Circuit concluded that "[t]here is simply no evidence in the record that any of the

appellees actually considered Omar's situation in the Davis home to be an abusive one prior to his adoption . . ." *Id.* at A-12.

Misstatements of Fact

In the "Statement of the Facts" section of the Petition, Plaintiff consistently refers to the allegations of the Complaint and to incidents that were discovered only after Plaintiff was removed from the Davis home in June 1993. However, it is critical to understand that, after Plaintiff's adoption in February 1991, the Defendants had no further involvement with Plaintiff or the Davis home. R.80-129; R.78-38; R. 74, ex. A, par. 3; R.99-18, 22. At that time, only the issues related to Plaintiff's medical history and Mr. Moringlane's investigation, discussed above, could have been known to the Defendants. As the district court found, even if everything in the pre-adoptive record were known to the Defendants, there was no evidence of abuse during the Defendants involvement with Plaintiff and the Davis home. *See* Resp. App., pp. 51a-52a. None of the alleged "egregious abuse" described on page 3 and 6 of the Petition was discovered until the 1993 investigation conducted by Karen Loomis. R. 93. The Petition's reference to facts discovered long after the Defendants' involvement in the case creates a misleading impression and suggests that the Defendants were somehow aware of abuse that occurred long after their involvement in Plaintiff's case. The district court's analysis, however, correctly focused on the Defendant's knowledge of the facts during the pertinent and appropriate time frame.

Moreover, throughout the Petition, Plaintiff inappropriately co-mingles the unproven allegations of his complaint with the record evidence in the case. Plaintiff attaches to his Petition a copy of the district court's Order denying Defendants' Motion to Dismiss, which, of course, assumed that the allegations in Plaintiff's Complaint were true. Plaintiff then quotes liberally from the district court's Order which repeats allegations later

demonstrated to be untrue in the district court's decision granting Defendants' Motions for Summary Judgment.[1] In fact, the same district court that Plaintiff freely quotes at the motion to dismiss stage later found that "mere allegations are not enough to survive a motion for summary judgment." Resp. App., p. 39a.

The Petition contains virtually no discussion of the district court's Order granting summary judgment in favor of the Defendants and very little discussion of the Eleventh Circuit's opinion. Noteworthy too is the fact that Plaintiff's Appendix fails to include the district court's Order granting Defendants' Motion for Summary Judgment – the very Order that prompted the appeal. That Order, which contains a detailed analysis demonstrating the lack of evidence to support Plaintiff's case is attached to the Brief in Opposition.

REASONS FOR DENYING THE PETITION

Plaintiff has not carried his burden of presenting "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Professional Judgment Standard should not be Considered because it was not Raised in the District Court or Court of Appeals.

In his Petition, Plaintiff raises an issue that has not been addressed throughout the entire course of the litigation. Plaintiff argues that the professional judgment standard articulated in *Youngberg v. Romeo*, 457 U.S. 307 (1982) should have been utilized by the Eleventh Circuit in performing the qualified immunity analysis in this case instead of the deliberate indifference standard recognized by *Estelle v. Gamble*, 429 U.S. 97 (1976). However, the professional judgment standard was never presented by the Plaintiff in the Eleventh Circuit either in the briefing or during oral argument. In fact, the professional judgment standard was never addressed or even mentioned by

1. *See* pages 11-13 of the Petition.

any litigant or court prior to the filing of the Petition for Writ of *Certiorari*.

In his Amended Complaint, Plaintiff alleged that Defendants Babcock, Moringlane, Morales and Rowley were *deliberately indifferent* to his constitutional rights. R.18, ¶ 106, 143, 150, 163. In Plaintiff's Memorandum of Law in Opposition to the Defendants' Motions for Summary Judgment based on qualified immunity, Plaintiff argued that the Defendants displayed *deliberate indifference* in carrying out their various roles. R.87. Plaintiff argued that *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) "put Defendants on notice that *deliberate indifference* to the risk of this harm would subject them to potential liability." [emphasis supplied] *Id.* at 20. The district court, in granting the Defendants' motions for summary judgment, analyzed the qualified immunity defense using the *deliberate indifference* standard as presented by both Plaintiff and Defendants. *See* Resp. App.

Plaintiff's Initial Brief to the Eleventh Circuit specifically stated that the "Defendants are not subject to this damage suit unless they were deliberately indifferent to [Omar's] right to be reasonably safe." *Initial Brief*, p. 29, (*citing Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004)). The Initial Brief contained a lengthy discussion of how deliberate indifference applies to this case. *Id.* In fact, the Plaintiff looked to the Second Circuit decision in *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981) in an attempt to broaden the deliberate indifference standard.

In Plaintiff's Reply Brief to the Eleventh Circuit, he once again addressed the deliberate indifference standard. In the Reply Brief, Plaintiff stated that "[t]he Plaintiff asserts that these Defendants were deliberately indifferent to the risk of harm (from either abuse or neglect) to Omar in the Davis home prior to his adoption by ignoring the signs that he was suffering

injuries and strange illnesses." *Reply Brief*, p. 3. The Reply Brief once again relied heavily upon *Ray* from the Eleventh Circuit and *Doe* from the Second Circuit. *Id.* The Reply Brief discussed the facts of the *Doe* case and compared them to the instant case. *Id.* at pp. 4, 5.

At no point in his Initial Brief or Reply Brief to the Eleventh Circuit did Plaintiff *ever* raise the argument that the professional judgment standard should apply to this case or cite any other circuit court or state supreme court case that applied the professional judgment standard in *any* context. In fact, the professional judgment standard was not argued in *any* of Plaintiff's pleadings, motions, memoranda of law or appellate briefs. Plaintiff had the opportunity to present cases from the Tenth or Seventh Circuit, just as he presented the *Doe* case from the Second Circuit. However, he never cited any cases applying the professional judgment standard and consistently argued that the deliberate indifference standard applied to foster care situations in general and to this case specifically. Therefore, the Eleventh Circuit did not *consider* the professional judgment standard and, consequently, did not address the professional judgment standard in its opinion affirming the district court's decision. Pet. App. A-1.

In the ordinary course, the Court does not "decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001) (*citing Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992)); *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."); *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168 (2004) ("We ordinarily do not decide in the first instance issues not decided below."); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."). Plaintiff failed to raise the argument in the court below that the

professional judgment standard should apply to this case. Plaintiff cannot claim that the Eleventh Circuit was incorrect in applying the very standard that Plaintiff argued *should* be applied, and now, after an adverse decision, argue that the Eleventh Circuit should have applied a different standard never raised or decided below.

II. There is no meaningful distinction between the Professional Judgment Standard and the Deliberate Indifference Standard.

Since the doctrine of qualified immunity was first recognized and articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the defense has served important, if not vital, public policy concerns. In *Harlow*, the Court held that qualified immunity shields government officials performing discretionary functions from civil liability where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 18. The Court has observed that qualified immunity applies in all but the most exceptional circumstances. *See Buckley v. Fitzsimmons*, 509 U.S. 258, 268 (1993). As stated in *Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1149 (11th Cir. 1994), a court should "think long and hard" before stripping a defendant of qualified immunity.

Within the foster care context, most circuit courts analyze the qualified immunity defense by determining whether the defendant/state actor was deliberately indifferent to the child's constitutional right to be free from the infliction of unnecessary harm. *See Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000); *Kodman v. County of Merced*, 95 F.3d 1157 (9th Cir. 1996); *Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994); *Norfleet ex rel. Norfleet v. Ark. Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993); *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *Taylor, supra* (11th Cir.); *Doe, supra* (2d Cir.). To establish deliberate indifference, the plaintiff must show that the defendant

knew of and disregarded an excessive risk of harm to the plaintiff. *Farmer v. Brennan*, 511 U.S. 828, 837 (1994). Subjective knowledge on the part of the official can be proved by circumstantial evidence to the effect that the excessive risk was so obvious that the official must have known of the risk. *Id.* at 842. However, "a defendant can rebut a prima facie demonstration of deliberate indifference either by establishing that he did not have the requisite knowledge or awareness of the risk, or that, although he did know of the risk, he took reasonable steps to prevent the harm from occurring." *Beers-Capitol v. Whetzel*, 256 F.3d 120, 133 (3d Cir. 2001) (citing *Farmer*, 511 U.S. at 844).

In his Petition, Plaintiff argues that the "professional judgment standard" should have been utilized by the Eleventh Circuit in performing the qualified immunity analysis, and that there is a "conflict" between the circuits and state supreme courts concerning which standard to apply in foster care cases. The professional judgment standard, which stems from cases involving involuntarily committed mental patients, holds that decisions made by professionals are entitled to a presumption of correctness. *Youngberg*, 457 U.S. at 324. Under the professional judgment standard, state officials are shielded from liability unless they failed to exercise professional judgment. *Id.* The proper inquiry is "whether the decision was so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one." *Patten v. Nichols*, 274 F.3d 829, 845 (4th Cir. 2001).

The only circuit court cases cited in the Petition as applying the professional judgment standard in the foster care context are *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992) and *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990). However, a close look at these cases, as well as other cases that have labeled their standard as the "professional judgment standard" reveals that there is no real conflict and

little, if any, difference between the professional judgment and deliberate indifference standards.

In *K.H.*, the Seventh Circuit stated that "[t]he substantive issue is whether the state can escape the duties that *Youngberg* imposes on public child-care institutions by *deliberately* and without justification placing children with foster parents having a *known* propensity to neglect or abuse children." [emphasis supplied] 914 F.2d at 852. The Seventh Circuit explained that "known" means "known to the defendants" because merely negligent, or even grossly negligent misconduct by state officers "is not actionable under section 1983." *Id.* The court concluded that state officials will only be liable when they "place the child in hands they know to be dangerous." *Id.* at 854.

Cases decided after *K.H.* illustrate that, although the Seventh Circuit has used the term "professional judgment standard," it integrates *Farmer's* subjective knowledge requirement to the extent that its standard is no different than deliberate indifference. For example, in *Lewis v. Anderson*, 308 F.3d 768, 771 (7th Cir. 2002), children brought a § 1983 action against several officials of the Wisconsin Department of Health and Social Services (DHSS). The court explained that ". . . agency officials and case workers are only liable if they violated the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, *whom the state knows or suspects to be a child abuser.*" [emphasis original] *Id.* at 773 (citing *K.H.*, 914 F.2d at 846). The court continued:

> The standard articulated in *K.H.* does not take the next step and impose some kind of duty of inquiry in these cases. If we are to follow *K.H.*, therefore, the DHSS officials cannot be held liable on the basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough

> inquiry. In order to survive summary judgment, the plaintiffs needed to put forth a case that the DHSS defendants actually knew of or suspected the existence of child abuse in the prospective family.

Id.

The court then outlined the test for "deliberate indifference," citing *Estelle* and *Farmer*, both of which used the deliberate indifference standard. *Id.*

Thus, in *Lewis*, the Seventh Circuit made no distinction between the professional judgment and deliberate indifference standards. The court cited *K.H.* – which utilized the professional judgment standard – and then cited *Estelle* and *Farmer* in articulating the standard. Finally, in declining to reconsider the standard set forth in *K.H.*, the court held that the *K.H.* standard "does not conflict with any decision of the Supreme Court or more recent decisions from this court." *Id.* at 776. *See also Collignon v. Milwaukee County*, 163 F.2d 982, 989 (7th Cir. 1998) (finding that the two standards require "essentially the same analysis.").

In *Yvonne L.*, the Tenth Circuit held that the professional judgment standard "implies abdication of the duty to act professionally." 959 F.2d at 894. The Tenth Circuit found that "[a]s applied to a foster care setting we doubt there is much difference between the two standards." *Id.*

The Supreme Court of Arizona refrained from labeling their standard because the two standards are so interchangeable. *Weatherford v. State of Arizona*, 206 Ariz. 529, 538 (Ariz. 2003) ("The standard we articulate today is also similar to the standard of conduct required by other circuit courts of appeals, whether denominated a 'deliberate indifference' or 'professional judgment' standard, in the foster care context."). The court cited the Eleventh Circuit for the proposition that "[a] child abused while in foster care, in order to successfully recover from state

officials in a section 1983 action, will be faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring." *Id.* (citing *Taylor v. Ledbetter*, 818 F.2d at 796). The court went on to discuss *Doe* and *Yvonne L.* to demonstrate that "when applied to the unique facts of the foster care context, not much difference exists between the 'deliberate indifference' and 'professional judgment' standards." *Id.*

The key to understanding why there is no meaningful difference between the two standards lies in the unavoidable conclusion that both standards occupy virtually the same point on the "culpability" spectrum – with negligence on one end and intentional wrongdoing on the other. In *Farmer*, the Court analyzed the level of culpability deliberate indifference entails. 511 U.S. at 836-47. The Court began the analysis by asserting that reckless disregard does not fully define the level of culpability required for deliberate indifference. *Id.* at 837. The Court considered what it described as "civil law" recklessness – in which the defendant "should have known" or would be "charged with such knowledge" – and "criminal law" recklessness – which essentially entails ignoring a known risk. *Id.* In concluding that "criminal law" recklessness was the appropriate level of culpability for deliberate indifference, the Court required a plaintiff to establish that the defendant "consciously disregarded" a substantial risk of serious harm. *Id.* at 839. With anything less, constitutional liability cannot be imposed. Unless a defendant *deliberately* fails to learn of a risk, the level of culpability never exceeds the negligence category – even if it is gross negligence.

Under the professional judgment standard, the *same* conclusion must be reached. "The substantive component of the due process clause protects against only the most egregious, arbitrary governmental conduct – that is, conduct that can be said to "shock the conscience." *Patten*, 274 F.3d at 834. In

Collignon, a case in which the professional judgment standard was applied, the court reasoned that gross negligence, "while more egregious, is still negligence and thus below the standard needed to impose constitutional liability." 163 F.3d at 988. "Only the *criminal recklessness* standard provides adequate notice of what conduct is or is not permitted; degrees of negligence vary considerably with the facts of each case." [emphasis supplied] *Id.* (citing *Archie v. City of Racine*, 847 F.2d 1211,1221 (7th Cir. 1988) ("A line that cannot be policed is not worth drawing in constitutional law.")). For that reason, the court concluded that, as a practical matter, there is little difference between the two standards. *Id.*

Thus, the "conflict" that Plaintiff describes in his Petition is more theoretical than real. No matter what labels are given, the standards are virtually the same. Within the context of investigating suspected child abuse, if a state official "fails to exercise professional judgment," it means he has *disregarded* the suspicion of abuse. Even if the official was grossly negligent, constitutional liability will not attach under either the professional judgment or deliberate indifference standard. In order to "fail to exercise professional judgment," the official needs to do so *knowingly*. As stated in *K.H.*, – a case cited by Plaintiff as authority for why the professional judgment standard should have been utilized in this case:

> Even when resources are not severely limited, child welfare workers and their supervisors have a secure haven from liability when they exercise a bona fide professional judgment as to where to place children in their custody. Only when without justification based either on financial constraints or on considerations of professional judgment they place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages.

914 F.2d at 854.

In other words, the official must "consciously disregard" a suspicion of abuse. Despite attempts to draw fine lines between the professional judgment and deliberate indifference standards, there is no meaningful difference between them.

III. Even Under the Professional Judgment Standard, The Eleventh Circuit was Correct in Affirming the District Court's Decision Granting Summary Judgment for Defendants.

Even if there is a difference between the standards, the Defendants in this case would have still been entitled to qualified immunity under the professional judgment standard. An examination of the cases that have utilized the professional judgment standard is instructive.

In *Lewis*, the Seventh Circuit, using the "professional judgment standard," found that caseworkers had an "iron-clad" defense of qualified immunity. 308 F.3d at 776. The evidence in the record indicated that the foster father had slapped another child in the past and that one of the three reference letters had been somewhat negative. *Id.* at 774. The letter stated that the parents had short tempers, the house was too small, the mother favored some of the children over others and the family was not stable enough for more children. *Id.* A therapist also expressed some concern that the children should not be placed together because it would overwhelm any parent. *Id.* at 775. Pointing out the mostly positive information received by the caseworkers, the court stated that "this evidence is insufficient to support a finding of knowledge or suspicion of child abuse" and that, even if the caseworkers were negligent, "negligence is not enough to give rise to a §1983 action." *Id.*

In *Johnson v. Holmes*, 377 F. Supp. 2d 1039, 1041 (D. NM 2004), the court utilized the professional judgment standard in a case in which a child was killed after a social worker had completed an abuse investigation. The social worker had

"received credible information from a health care worker" that the child's adoptive mother was physically abusing the child. *Id.* at 1048. Although the social worker noticed a bruise on the child, she concluded that the bruise was not the result of abuse. *Id.* at 1041. The social worker potentially compromised the investigation by telling the adoptive mother not to worry, by not contacting any third parties – in violation of standard operating procedures – and by not speaking to the pediatrician who observed the injuries. *Id.* at 1048.

In its opinion, the court emphasized that a social worker's decision is usually subjective and that the case must be reviewed on what was known then. *Id.* at 1049. The court found that, at the time of the investigation, others in daily contact with the child never suspected abuse, there was a lack of observed injuries and there was a rational explanation for the claimed abuse. *Id.* The court found that the social worker did apply professional judgment in reaching her conclusion even if the court did not agree wholeheartedly with that conclusion. *Id.* Since the social worker "did not fail to use professional judgment," she was entitled to qualified immunity. *Id.*

In the instant case, like *Lewis* and *Johnson*, there is no evidence that any of the Defendants failed to use professional judgment. In fact, the record contains absolutely no evidence that Defendants were even negligent in performing their respective jobs, and the district court repeatedly stated as much. The court found that Ms. Babcock had "personal knowledge of a positive home situation," was in "regular contact" with Plaintiff and Ms. Davis, provided "regular intervention" for support and medical care, conducted two home studies, made regular home visits and telephone contacts, conferenced regularly with her supervisors and had known and been in regular contact with Ms. Davis from at least August, 1988 until February, 1991. Rep. App., p. 31a. Further, the court found that Ms. Babcock knew that a report reflected that "the DCF investigator found a lack

of supporting evidence that the caretaker committed abuse of the child in the single incident alleged." *Id.* As for Mr. Moringlane, the court found that "Plaintiff has failed to show that the investigation by Moringlane did not occur or that Moringlane lacked good faith in conducting it." *Id.* at 41a. The court explained that Ms. Morales and Mr. Rowley, as supervisors, received all of their information concerning Plaintiff from Ms. Babcock and, as stated above, the record is clear that Ms. Babcock never expressed any concerns of abuse. *Id.* at 43a, 53a.

Most importantly, the court found that *there was no evidence of abuse in the record* during the Defendants' involvement with Plaintiff and the Davis home. The court stated that "[t]here is no competent evidence in the record to support the contention of Plaintiff that seizures, dehydrations, hospitalizations, other medical issues, and aversions to baths are indications of child abuse." *Id.* at 51a. In fact, those illnesses illustrate that numerous physicians – all mandatory reporters – saw Plaintiff and never suspected abuse. As for the CPT report, the court found that it "does not reflect that abuse of Plaintiff by Davis had occurred." *Id.* at 52a. "To the contrary," the report states that there was a lack of evidence that abuse had occurred. *Id.*

In his Petition, Plaintiff cites to nothing in the record, only to excerpts from the Affidavit of Linda Radigan. Ms. Radigan's Affidavit simply repeats Plaintiff's allegations and is, at most, an opinion that the Defendants were negligent in this case. Although Ms. Radigan criticizes the professional judgment of the Defendants, at no time does she state that the Defendants failed to use professional judgment.

Ultimately, since the evidence in the record clearly does not indicate a violation of either the deliberate indifference standard or professional judgment standard, Plaintiff attempts to create a new standard. Plaintiff repeatedly and illogically argues that Mr. Moringlane disregarded abuse because he

concluded that abuse had not occurred. Pet.-7. The district court correctly called attention to the absurdity of this argument.[2] There is simply no standard to which such reasoning applies, certainly not the deliberate indifference or professional judgment standard. As the district court stated,

> Plaintiff's argument that the failure after investigation to find abuse when abuse actually occurred equals deliberate indifference towards the abuse would result in the articulation of a new standard under which public officials could be exposed to widespread liability. There may be instances where officials conduct a proper and appropriate investigation and conclude that there was no abuse, when abuse has in fact occurred.

Id. at 38a, n.8.

Plaintiff cannot, through circular reasoning, create a new standard and then attempt to call it the professional judgment standard. A reading of the district court's opinion and the Eleventh Circuit's decision affirming that opinion leads to the unavoidable conclusion that those courts would not have found that Defendants failed to use professional judgment.

IV. The Deliberate Indifference Standard was Correctly Defined by the Eleventh Circuit.

The final argument in Plaintiff's Petition is that the Eleventh Circuit incorrectly interpreted the deliberate indifference standard as containing only a subjective component, and that the deliberate indifference standard should be defined within

2. As outlined in the "Statement of Facts" section of this brief, the court summarized Plaintiff's three step argument as follows: (1) belt type markings conclusively illustrate abuse; (2) if Moringlane followed appropriate investigative procedures, then he would have discovered that Plaintiff was abused by Davis; (3) therefore, deliberate indifference can be inferred from the fact that Moringlane failed to conclude that there was abuse. Resp. App., p. 38a.

the foster care context using an objective test of recklessness. However, the Eleventh Circuit has not defined the deliberate indifference test any differently than any other circuit. *See Nicini*, 212 F. 3d at 812 n.10 (finding that "after *Farmer* the courts of appeals have shown a tendency to apply a purely subjective deliberate indifference standard outside of the Eighth Amendment context."). Plaintiff fails to point to *any* case in which a subjective component is *not* part of the deliberate indifference analysis. As discussed above, the degree of "recklessness" needed for deliberate indifference is criminal law recklessness, which is defined as the "conscious disregard" of a known risk. *Farmer*, 511 U.S. at 839. Without a culpable state of mind, a state official's actions could hardly be characterized as *deliberate*. As the district court reasoned in the instant case:

> Without the requirement that Plaintiff must produce direct or circumstantial evidence pointing to subjective awareness of the abuse by the official and deliberate disregard of that risk by conduct that is more than mere negligence, the burden would rest on the public official to provide that he was not deliberately indifferent. Such standard, if adopted, would ultimately defeat the public policy reasons behind qualified immunity.

Resp. App., p. 38a, n.8.

Plaintiff argues that courts using the deliberate indifference standard should consider objective factors when "the obviousness of the likelihood of harm is abundantly clear." Pet.-28. However, *Farmer* and its progeny have not ruled out the possibility that in certain extreme circumstances, the obviousness of a risk can be considered in the deliberate indifference analysis. As stated in *Farmer*, "even if 'deliberate' is better read as implying a knowledge of a risk, the concept of constructive knowledge is familiar enough that the term 'deliberate indifference' would not, of its own force, preclude a

scheme that conclusively presumed awareness from a risk's obviousness." *Id.* at 840.

In this case, however, Defendants did not have knowledge of a serious risk and, clearly, the lower courts did not feel that the risk was obvious enough to impute knowledge to the Defendants. In fact, there is "no competent evidence" in the record that is indicative of abuse. Resp. App., p. 51a. When there was a suspicion of abuse, as in the case of Mr. Moringlane (as there is in *any* investigation), the court ruled that Plaintiff "failed to elicit facts that Moringlane disregarded the risk of child abuse . . ." Thus, the Petition has failed to demonstrate that the Eleventh Circuit applied an incorrect deliberate indifference standard.

CONCLUSION

Plaintiff/Petitioner has not established any compelling reasons for the Court to grant the Petition for Writ of Certiorari. Therefore, Defendants/Respondents respectfully request that the Petition be denied.

Respectfully submitted,

JAMES M. KLOSS
Counsel of Record
RONALD L. HARROP
COONEY, MATTSON, LANCE,
BLACKBURN, RICHARDS
& O'CONNOR, P.A.
111 N. Orange Avenue
Suite 850
Post Office Box 4850
Orlando, FL 32801
(407) 843-2100

Counsel for Respondents

APPENDIX

APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AUGUST 27, 2004

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No.: 6:02-cv-1063-Orl-19KRS

OMAR, by and through his next friend, Kevin Cannon,

Plaintiff,

- vs-

GLORIA BABCOCK, CINDY MORALES, RAUL MORINGLANE, JR., and BRUCE ROWLEY, each individually,

Defendants.

ORDER

This case comes before the Court on the following:

1. Defendant Raul Moringlane, Jr.'s Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 69, Filed on May 28, 2004); Memorandum of Law in Support of Defendant Raul Moringlane, Jr.'s Motion for Summary Judgment Based on Qualified Immunity (Doc. No. 70, Filed on May 28, 2004).

2. Defendant Bruce Rowley's Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 71, Filed on May 28, 2004); Memorandum of Law in Support of Defendant Bruce Rowley's Motion for Summary Judgment (Doc. No. 72, Filed on May 28, 2004).

3. Defendant Cindy Morales' Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 73, Filed on May 28, 2004); Memorandum of Law in Support of defendant Cindy Morales' Motion for Summary Judgment Based on Qualified Immunity (Doc. No. 74, Filed on May 28, 2004).

4. Defendant Gloria Babcock's Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 75, Filed on May 28, 2004); Memorandum of Law in Support of Defendant Gloria Babcock's Motion for Summary Judgment Based on Qualified Immunity (Doc. No. 76, Filed on May 28, 2004).

5. Defendants Gloria Babcock, Cindy Morales, Raul Moringlane, Jr., and Bruce Rowley's Motion to Strike Affidavit of Linda Radigan. (Doc. No. 105, Filed on August 11, 2004).

6. Defendants Gloria Babcock, Cindy Morales, Raul Moringlane, Jr., and Bruce Rowley's Unopposed Motion To Strike the Deposition of Barbara Holmes and Deposition of Joan Adkins Lindsey and

Memorandum of Law in Support Thereof. (Doc. No. 107, filed on August 11, 2004).

7. Plaintiff's Response to Defendants' Motions to Strike Depositions of Barbara Holmes and Joan Adkins Lindsey. (Doc. No. 112, Filed on August 23, 2004).

In addition the parties have filed depositions, affidavits and exhibits in support of or in opposition to these motions.

The Facts

Plaintiff's life could be described as a tragedy from the moment of his birth to the present. The events of which Plaintiff complains in this case occurred between November of 1989 when he was placed in the foster care of Joann Davis and June 23, 1993 when he was removed from the Davis home. Most of the fact witnesses who were deposed expressed difficulty with recollection of events that had transpired between 11 and 14 years ago. Thus much of what has been presented to the Court comes from records.

Plaintiff is a minor. He was born on November 24, 1986 and named Demetrius Omar Jurineack ("Omar"). (Doc. No. 68, filed on May 28, 2004, Ex. A) The record reflects that in January of 1988 he was abandoned by his mother with his older brother Jamal in a motel. (Doc. 99, Depo. of Morales Ex. #6291) The two boys were taken into custody by the foster care unit of the state's Department of Children and Family Services ("DCF") (then called the Department of Health and Rehabilitative Services) on January 16, 1988. (Id)

The records reflects that Omar's mother was a drug addict and prostitute who was in and out of jail, had no stable place to live, was unable to care for her children, and was unsure of the identity of Omar's father.

The two boys were placed in separate shelter foster homes while the foster care counselor attempted to locate relatives who would care for them. Omar was placed temporarily with Joyce Bailey who, the records reflect, reported in April of 1988 that Omar was jealous, fought with other children and ". . . is a monster." (*Id.* Ex. # 6074; Depo. Of Lindsey Doc. 98 Ex. # 6329 - 6330) Omar was then placed in a shelter home with Ms. Vassie Wiggins. The records reflect that Ms. Wiggins reported that Omar cried frequently, undressed himself during the night and refused to sleep with his pajamas on, which she stated could explain his continued congestion, was afraid of strangers, and had a withdrawn personality. (*Id.* Ex. # 6074, 6074A, 6330, 6331) There was reference that Omar had been mistreated at the previous shelter, possibly by being locked up or left in his crib all day. (*Id.* Ex. # 6329, 6075A) The records also reflect that on a visit to the shelter home in September of 1988 by the foster care counselor, Ms. Wiggins expressed concern about Omar's continuous water consumption and suspected he might be a diabetic. (*Id.* Ex. # 6327).

In November of 1989, Plaintiff was placed by DCF in the foster care of Joann Davis. Gloria Babcock, a DCF adoption counselor, had met Davis at a MAPP training which prepared foster parents to care for special needs children. (Doc. 80, Depo of Babcock, p. 9) Davis had been twice married, once at age 22 for a year until she divorced because

her husband physically abused her and once at age 26 for six years until she divorced because of her husband's infidelity. *Id.*, Ex. A) Davis was 36 years old when Omar was placed in foster care with her.

Prior to Omar's placement with her, Ms. Davis had been the foster parent to a 13-year old girl, Melissa, who had been sexually abused. Before the placement of this child took place, Babcock conducted a home study, completed on August 4, 1988, that recommended the adoption of this child be approved. (Doc. No. 76, Ex. A). The August 1988 home study reflected that Davis had experience taking care of younger children, but Davis did not wish to parent a younger child because of her age. *Id.* Melissa remained in counseling after being placed in the Davis home. The report of the August home study reflects that three reference letters on Davis were obtained, all positive, investigation of Davis' employment and income was made, indicating she had the appropriate life and medical insurance, verification of her marital status was made, a physician's report indicating essentially normal physical findings was received, abuse registry and police checks were made and were negative, and the home was visited, revealing that the living arrangements were appropriate. (*Id.*)

Thereafter, Davis advised Babcock that she would like to adopt a younger child, Vernetta, who was deemed "slow" for her age. (*Id.*, Ex. B) While expressing her commitment to Melissa, who was still in counseling for the sexual abuse suffered before her placement, Davis also expressed that by parenting a 13 year old, she did not have the chance to get the nurturing experience that comes from parenting a younger

child. A second adoptive home study was done of the Davis home by Babcock dated February 3, 1989, some six months after the first home study. Melissa was questioned and was supportive of the adoption of a baby sister. Three references were obtained on Davis since Melissa had been placed with her, and each stated that Davis was an excellent parent, mature and capable of handling the parenting of two children. Police and abuse registry checks were negative. Ms. Babcock concluded:

> RECOMMENDATIONS:
>
> Since Ms. Davis has demonstrated she is a capable adult and has provided the love, guidance and support that Melissa needs, I feel that Ms. Davis can provide the same support and love for Vernetta Townsend. I stated before Ms. Davis is aware of Vernetta's special needs, yet this does not keep her from wanting to adopt Vernetta. Based on the fact Ms. Davis is a mature, responsible, caring and committed adult I recommend she be approved to adopt Vernetta Townsend and subsidy be approved.

(Doc. No. 76, Ex. B) However, Vernetta was adopted by another person.

Thereafter and before the adoption of Melissa had been completed, Davis contacted the DCF in May of 1989 and requested that Melissa be removed from her home. (*See* Doc. No. 76, Ex. C). The records reflect that Melissa had been acting out sexually, and Davis felt Melissa had disrespected

her church by going into the back of the church in the dark with a boyfriend. Davis reported that Melissa was talking back and would not obey. The records reflect that counseling was offered by the adoption counselor, that no placement for Melissa was immediately available, and that Melissa and Davis were trying to talk it out. The parties advise the Court that Melissa left the Davis home.

Plaintiff's case had been assigned to DCF adoption counselor Babcock in June of 1989, and Plaintiff was placed in the Davis home some six months later. Also placed in the Davis home were Omar's brother, Jamaal, and an unrelated girl renamed Keisha. No home study for this placement has been identified in the record. In the interval between Plaintiff's arrival in the Davis household and his adoption by Davis, Plaintiff suffered from a history of seizures. (Doc. No. 76, Ex. F). The cause of these seizures was unknown. *Id.* In the period between April 1990 and July 1990, Plaintiff was referred for a special neurological examination, but the examination did not indicate that the seizures were related to a neurological dysfunction. (Doc. No. 76, Ex. G). There is notation in the records that the seizures may have been caused because Plaintiff held his breath. (E.g., Doc. 76, Ex. G; Ex. # 6046)

The records of DCF reflect that Babcock was in regular contact with Davis and Plaintiff over the fourteen months he was assigned to her from June of 1989 while he was in foster care and then while he was in pre-adoption placement in the Davis home from November of 1989 until his adoption in February 28, 1991. Home visits were conducted on a regular basis, and services were offered to the family such as family

counseling to adjust to being a family and a referral to CMS for evaluation of Plaintiff's seizures in May of 1990. The records generated by Babcock indicate such things as "Children forming a friendship with each other" (December 11, 1989) ; "Joann is adjusting to parenting three children. Omar has accepted Jamaal and Stephanie as his sister and brother. . . . Joann at times feels overwhelmed at being the parent of three children. She is very active with the children . . ." (January 25, 1990); "All concerned adjusting to living with each other . . . Child accept Joann as their mother. Family members are very playful & loving with each other." (February 9, 1990); "Boys adjusting well to living with each other" (March 22, 1990); "Children doing well. Ms. Davis adjusting to parenting three children. All children doing well at school & home. Ms. Davis seems to have limit resources when it comes to after hours care for the children. Omar was in the hospital for seizures; he has since been referred to CMS and has an appt on 5/7/90. Mrs. Davis does at times feel overwhelm, simple because she doesn't have a regular babysitter. She is looking for back up child care." (April 16, 1990); "Joann adjusting to parenting three children. Joann has lowered her expectation of the children and accepting them f(who they are and where they are. Older children are in counseling. Joann expressed less feeling of being overwhelmed of the care of three children. Children in counseling and doing well. Children in school doing well." (May 25, 1990); "Children appear bonded to each other and their mother. All are very talkative & active. Mrs. Davis is now accepting of the children each for who they are. Mrs. Davis had high expectation of Stephanie, but since being in counseling she has lower them, and is more accepting. Mrs. Davis expressed no feeling of being overwhelmed.

She & the children will continue with counseling." (June 22, 1990); "Adjusting to parenting three children . . . Mrs. Davis expressed no feelings of being overwhelmed." (August 27, 1990); "Mrs. Davis has continued counseling for children . . . Ms. Davis again advised to contact attorney to finalize. She made no request of counselor and expressed no feelings of being overwhelmed." (September 18, 1990); "Adjusting to each other well. Jamaal very much the big brother. Joann has children in counseling, all are doing well. No feeling expressed about being overwhelmed." (October 17, 1990); "Family very outgoing and __ with each other . . . Omar continues to have small seizures, which cause Joann concern. Joann concerned about Omar health. (November 28, 1990); "Family continues in counseling and doing well. Mrs. Davis continues to accept each child for who they are. Omar continues to have seizures and the origin remains unknown. Joann continues to grow as a parent. Courts issue finalization in February." (January 18, 1990). (Doc. 76, Ex. F, Ex. #6051-6061) DCF records reflect that in addition to frequent telephone conversations with Joann Davis, the adoption counselor conducted home visits at the Davis home with Davis and the children in March, April, May, August, September, October, and November of 1990 and in January of 1991.[1] (*Id.* at Ex. F)

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1. Babcock testified that she called to set up home visits at a time when she could go to the home with the kids and mother present. She would talk to the kids to find out how they were doing and if everything was going okay, and talk to the mother to find out if she was having any problems or concerns. (Depo. of Babcock, Doc. 80 p.120) When she talked to the children, it was usually without the parent present. (Id. at Plaintiff 132)

Appendix

DCF officials Gloria Babcock, Cindy Morales, and Bruce Rowley attended an Administrative Review Conference on September 12, 1990 to evaluate Plaintiff's case up to that point in time. (Doc. No. 79, Rowley Depo., "Administrative Review Conference Report") The conference report indicated that DCF's goal was to follow through on the adoption of Plaintiff by Davis. *Id.*

In December of 1990, a suspicion that Plaintiff might have been abused was raised. (*See* Doc. No. 87, filed on June 4, 2002, Ex. 4, "Child Protection Team Report," p.1) On December 21, 1990, Plaintiff was admitted to Arnold Palmer Hospital for treatment of pneumonia.[2] When Dr. Villadiego examined Plaintiff, he discovered marks on Plaintiff's back and buttocks which Dr. Villadiego was concerned might be the result of abuse. Dr. Villadiego contacted the Florida Department of Children and Families regarding Plaintiff. *Id.*

The Child Protection Team report reflects that later on December 21, 1990 Child Protection Team Case Coordinator Bubba Martin spoke with Davis. *Id.* Davis reported to Martin that she had not noticed the marks on Plaintiff until Dr. Villadiego discovered them, and Davis could not explain how they had occurred. *Id.* When Davis spoke with Dr. Fahy, a Child Protection Team physician, on December 24, 1990, Davis reported that the marks were caused when an 11-year

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2. In addition to the December 21, 1991 hospitalization for pneumonia, Plaintiff had been admitted to Arnold Palmer Hospital earlier that month for a seizure. (Doc. No. 78, Moringlane Depo, Ex. 37, " Dr. Villadiego's History and Physical Examination of Plaintiff," p.1)

old sibling hit Plaintiff with an electrical extension cord from a deep fry. *Id.*

On December 24, 1990, as part of the Child Protection Team's investigation into the markings on Plaintiff that were discovered on December 21, 1990, Dr. Fahy conducted a medical examination of Plaintiff. *Id.* Dr. Fahy documented loop marks on the child's back. *Id.* Dr. Fahy was unable to offer an opinion as to the source of the injuries. *Id.* at 2.

The Florida Department of Children and Families assigned Defendant Raul Moringlane, Jr. to investigate the alleged abuse of Plaintiff in December of 1990. (Doc. No. 87, Ex. 4, p.1) DCF employed Moringlane as a child protective investigator during the period of time at issue. (Doc. No. 78, Moringlane Depo, pp. 4-5). Moringlane does not recall the case or his investigation and has no recollection as to what his findings were. (*Id.* at 10, 13, 24) Moringlane could not find the file on the case and does not independently remember if he even conducted the investigation some 13 years ago. *See Id.* at 13. Today, the DCF report that contained the Department's findings and conclusions as to the December 1990 incident cannot be found. *Id.* at 8. However, in his deposition Moringlane was asked about the provision of the Child Protection Team report which states: "According to P.I. Morninglane, Adoptive services will follow the family to assess needs and arrange any services needed in the home." (Doc. 78 p. 34) Moringlane testified that based on the usual manner of conducting an investigation, he would have talked to the adoption counselor about the report so that person could follow up and make sure Omar was getting services and do a follow-up. (*Id.* at p. 34-35) Moringlane testified

that since the Child Protection Team report stated that Omar stayed in the home, he must have determined at the time that Omar was not a victim of abuse by the caretaker, but that an incident did happen in the home for which the caseworker should follow up with services. (*Id.* at 35.)

After the December 1990 incident, adoption counselor Babcock conducted another home visit at the Davis home in January of 1991 and found that Mrs. Davis and the children were doing well. (Doc. 76, Ex. F) A Consent to Adoption was signed by Bruce Rowley, DCF Adoptions Supervisor dated January 16, 1991, two years to the day from when Plaintiff had first come into DCF custody. Plaintiff was adopted on February 28, 1991 by Davis, along with his biological brother and an unrelated girl. (Doc. No. 68, Filed on May 28, 2004, Ex. A, "Final Judgment of Adoption") Babcock testified:

> Q. Before the adoption of Omar by Ms. Davis was finalized did you have any evidence that Omar had been abused by Joann Davis?
>
> A. No, I didn't have any evidence.

(Depo. of Babcock, Doc. No. 80, p. 129 lines 21-25)

The finalization of the adoption ended the involvement in Plaintiff's case by the Defendants who were or had been members of the Adoption Unit of the DCF. None of the Defendants is shown to have had any involvement with Plaintiff or Ms. Davis between shortly after the adoption was finalized in 1991 and the time when Plaintiff was brought back into the custody of the DCF in 1993.

However, the records reflect that subsequent to the adoption and after Defendants' duties as employees of DCF with reference to Plaintiff's adoption placement had ended, there were allegations of abuse involving the Davis family. On October 24, 1991 a report of child abuse in the Davis home was made to the Florida Protective Services System, and the record indicates that it was closed "without classification". (Doc. 94, Depo. of Malave, Ex. 77) In December of 1992, Ms. Davis filed a Missing Persons report when the three children left home. (*Id.* at Exhibits 70, 71) Reports of child abuse in the Davis home were made to the Orlando Police Department on January 14, 1993 and again on January 29, 1993. (Doc. No. 94, Depo of Malave, Ex. # 369-370.) The Children's Home Society referred Plaintiff to Lakeside Alternatives, Inc. for a psychological evaluation on February 11, 1993 because of his emotional and behavioral problems. (*Id.* at Ex. 68) The evaluation noted that Ms. Davis described Omar as being very obstinate, not listening, lying frequently and stealing food; that he was having behavioral problems at school that required two adults to remove him from class, that he tried to stab his eight year old sister, that he had been drinking out of the toilet, and that he had difficulty controlling his anger. (*Id.*) The assessment found that Omar was depressed and emotionally deprived, due both to perceived rejection and abandonment by his biological parents and fear of losing his adopted mother. It recommended counseling for Plaintiff and for Ms. Davis. The report contained no reference to child abuse. (*Id.*)

On May 4, 1993 the Florida Protective Services System received a report of child abuse in the Davis home. (Depo of

Yahnke, Ex. 122, Ex. # 1391-1397) Plaintiff and the two other Davis children were removed from the Davis home and placed in DCF shelter care on June 23, 1993. The Davis children stated that the abuse was ongoing from autumn of 1989 through June of 1993. (*Id.* at 4) They reported that Davis did not provide them with sufficient food and often left them alone at night for many hours. (*Id.*) The Davis children described to DCF investigator Karen Loomis incidents such as being "tied to a bedpost all night, having food and water withheld up to 3 days, being locked in an animal cage, forced to sleep in a dark garage alone, being tied together in Joann's doorway with/their hands behind them all night, being forced to eat feces & vomit, being hit with/fishing rod, hammer, frying pan, switch, shoes & sticks." (*Id.* at 5)

Plaintiff's expert, Linda Radigan, a former official of the Florida Department of Children and Families, worked at the central office from 1992 until 2002 and served in various positions, including Assistant Secretary with responsibility for Florida Family Safety Program which operated the foster care system. The contents of Ms. Radigan's affidavit (Docket Number 91) allege deficiencies greater than the arguments in Plaintiff's brief in opposition to Defendants' motions for summary judgment. Ms. Radigan references failures of DCF officials to follow Department policies, although she does not identify these policies by citation to any writing nor does she state the date that such policies were in effect. Radigan testified that DCF did not conduct a home study assessing the appropriateness of the Davis home or Davis' ability to parent three young children when they were placed there. (Doc. No. 91, Filed on June 23, 2004, Affidavit of Radigan, at ¶ 10) Radigan also states that the files are devoid of the

required documentation to show how Plaintiff and Plaintiff's brother were chosen for Davis, (*Id.* at ¶ 19) and that DCF failed to train, evaluate, and prepare Davis to care for three young children with special needs. (*Id.* at ¶ 11)

Radigan details a number of other department policies that DCF officials failed to follow. For example, she states that there was no exploration of the reasons for the disruption of the adoption of the 13 year old girl. (*Id.* at ¶ 1). There was no assessment of Davis' financial means to care for three children despite the fact that DCF noted that Davis suffered from financial hardship. (*Id.*) DCF officials also failed to assess Davis' work requirements, child care needs or plans. (*Id.*) Radigan testifies that there was no evidence of any evaluation of the special needs of the three children or transition of them into the Davis home. (*Id.*) Ms. Radigan states that the actions, or inactions, were initiated by adoptions worker Gloria Babcock, approved by supervisor Cindy Morales, and later ratified by the conduct of supervisor Bruce Rowley. (*Id.* at ¶ 13) In Paragraph 34 of her affidavit she states that adoption team staffings were not held.

Ms. Radigan also states, without reference to a policy of the DCF, that Babcock failed to conduct a follow-up with Dr. Freeman, a psychologist who worked with Davis. (*Id.* at ¶ 17) A July 17, 1990 letter from Dr. Freeman indicates that Davis set up power struggles with the children. Although Dr. Freeman encouraged Davis to offer praise or time out instead of other forms of punishment, Radigan opines that Babcock did not follow-up with Dr. Freeman as to what these other forms of punishment were or for any other information. (*Id.*)

Radigan testifies that throughout 1990 Defendants missed signs that Plaintiff's health was declining. Further signs of abuse and neglect only increased with time, she states, including the incident in which the loop marks on Plaintiff's back were discovered by the doctor at Arnold Palmer Hospital, the power struggles with the mother, and the mother feeling "overwhelmed". If normal DCF procedures were followed, she contends, Rowley and Babcock would have also been aware of this information.

Radigan also testifies that DCF investigators are taught during training that looped marks are signs of abuse. Even if an official identified the person who inflicted loop marks on a child, she contends the occurrence of the abuse cannot be classified as unfounded because if one child is injured by another child, the parent is still responsible for failing to protect the injured child from the other child.

In addition to the affidavit of Ms. Radigan, Plaintiff offers the testimony of Barbara Holmes who was employed in March of 2002 as a foster care specialist at DCF and had been working for DCF for approximately 14 years. (Doc. No. 97, Filed on June 23, 2004, Holmes Depo, p. 4) In a suit by Plaintiff against DCF, Holmes testified by deposition that when she was an adoptions counselor, she handled close to 70 or 80 cases at a time. (*Id.* at 14) The Child Welfare League of America recommends that adoption workers handle only 14 cases at a time. *Id.*

Defendants do not dispute that Plaintiff was the victim of severe abuse at the hands of Davis.

Appendix

Plaintiff filed this law suit on September 12, 2002, alleging that Defendants Moringlane, Rowley, Morales, and Babcock violated 42 U.S.C. Section 1983 by depriving the Plaintiff of his constitutional right to, and liberty interest in, being free from unwanted abuse in the foster care and adoption placement of him with Joann Davis. Defendants now move for summary judgment on the issue of qualified immunity. Defendants also move to strike the affidavit of Linda Radigan and the depositions of Barbara Holmes and Joan Adkins Lindsey. This order analyzes the qualified immunity issue and the motions to strike.

Standard of Review

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett,* 477 U.S. 317, 323 (1986).

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson,* 477 U.S. at 255. The

court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

Legal Analysis

The doctrine of qualified immunity provides public officers protection from undue interference with their duties and from disabling law suits. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Qualified immunity shields such officials from civil liability in the performance of their discretionary functions where their conduct does not violate clearly established statutory or constitutional rights. (*Id.*) Due to the expense and diversion of energy attendant to a lawsuit, qualified immunity is protection from suit, not just liability. *Siegert v. Gilley*, 500 U.S. 226 (1991). Immunity is lost if a case erroneously goes to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

When asserting qualified immunity, the defendant must show that he was acting within the scope of his discretionary authority. *Jordan v. Doe*, 38 F.3d 1559, 1565 (11th Cir. 1994); *Hutton v. Strickland*, 919 F.2d 1531, 1536, 1537 (11th Cir. 1990). The scope of the immunity is determined by the duties entrusted to the defendant in relation to the injury claimed. *Haarbert Intern., Inc. v. James*, 157 F.3d 1271, 1282 (11th Cir. 1998). If the defendant shows that he was acting within the scope of his discretionary authority with reference to the

harm alleged, the burden then shifts to the plaintiff to show that a constitutional right of the plaintiff was violated by the defendant, and that such constitutional right was clearly established. *Saucier v. Katz,* 533 U.S. 194 (2001); *Harlow,* 457 U.S. at 818; *see also Rich v. Dollar,* 841 F.2d 1558 (11th Cir. 1988). Thus, the plaintiff faces a stringent burden when attempting to defeat a defense of qualified immunity. *See Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993). In order to defeat a defendant's motion for summary judgment, a plaintiff "facing qualified immunity must produce evidence that would allow a fact-finder to conclude that no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts." *Id.*

The constitutional right implicated by Plaintiff is the fundamental interest to be free of physical and emotional abuse when placed in foster and adoptive care by employees of DCF. In order for Plaintiff to show that Defendant violated his liberty interest in being free from unwanted neglect and abuse, Plaintiff must adduce evidence that the Defendant had actual knowledge of the abuse and neglect he suffered or that the Defendant deliberately failed to learn what was occurring in the home where he was placed. *Taylor v. Ledbetter,* 818 F.2d 791, 796 (11th Cir. 1987). In *McElligott v. Foley,* 182 F.3d 1248 (1999), the Eleventh Circuit held that the analysis of deliberate indifference has three components: "(1) subjective knowledge of a risk of serious harm; (2) disregard of the risk; (3) by conduct that is more than mere negligence. *Id.* at 1255. Proof of negligently inflicted harm is insufficient, and the inquiry is not whether officials exercised "due care". *County of Sacramento v.*

Lewis, 523 U.S. 833, 846 (1998); *Daniel v. Williams*, 474 U.S. 327, 328 (1996).

In *Taylor v. Ledbetter*, the Court found that allegations that foster care officials did not follow departmental guidelines, in the absence of knowledge of a risk of child abuse, stated a claim for violation of one's right to procedural due process but do not amount to a showing of deliberate indifference. 818 F.2d at 798-800. The Georgia foster care statute at issue in *Taylor* required the development of a plan that addressed the child's needs, an evaluation of each foster home, and supervision of the foster home through monthly visits. *Id.* at 799. The Georgia procedure ultimately mandated that officials follow certain guidelines and take affirmative steps to ensure the safety of children in foster care. *Id.* In the absence of knowledge of a risk of child abuse, the Eleventh Circuit held that the failure to follow the Georgia foster care statute gives rise to a procedural due process violation but did not amount to a showing of deliberate indifference. *Id.*

In line with *Taylor and McElligott*, the Eleventh Circuit, in *Ray v. Foltz*, 370 F.3d 1079, 1084-85 (11th Cir. 2004), held that the mere failure to gather certain information as required by DCF policy which may have alerted DCF officials to a potential risk of harm does not rise to the level of deliberate indifference. In *Ray*, the plaintiff alleged in his complaint that the defendants failed to gather certain information required by DCF policy, and this information would have alerted officials to the risk of harm. *Id.* at 1081. Specifically, the plaintiff alleged that the defendants failed to obtain information from another state concerning the foster parents' adoption history, failed to obtain a complete foster

parent application, and failed to require certain training during which government officials would have discovered additional background information. *Id.* at 1084, n.4. The plaintiff also alleged that the defendants ignored signs of abuse and neglect that plaintiff suffered within days of his placement. *Id.* at 1084. However, the plaintiff failed to claim that the defendant knew of these problems. *Id.* The defendants moved to dismiss the complaint on the grounds of qualified immunity. *Id.* at 1080. The Eleventh Circuit reversed the District Court, finding that the suit was barred by qualified immunity, and held that allegations of failure to follow state policies and procedures do not support a claim for damages. *Id.* at 1085. Specific allegations that the defendant knew of the abuse problems are necessary. *Id.* at 1084. Where damages are sought, the plaintiff must allege more than mere failure to follow guidelines; plaintiff must allege that the defendants had actual knowledge that plaintiff was being abused (or at substantial risk of being abused) or that they deliberately chose not to learn of the abuse. *Id.* at 1085.

Following the Eleventh Circuit's reasoning from *Taylor, McElligott* and *Ray* , if the Defendants show that they were acting within the scope of their discretionary authority as employees of DCF and assert qualified immunity as a defense, the Court must grant summary judgment for Defendants unless Plaintiff presents evidence, either direct or circumstantial, that Defendants knew that Plaintiff was being abused or were deliberately indifferent to the risk of abuse and disregarded that risk through conduct that is more than merely negligent. *See also Farmer v. Brennan,* 511 U.S. 825, 836 (1994) (to be deliberately indifferent, the official "must both be aware of facts from which the inference could

be drawn that a substantial risk of harm exists, and he must also draw the inference"); *Estelle v. Gamble,* 429 U.S. 97, 106 (1976) (deliberate indifference requires more than proof of negligence or carelessness); *Steele v. Shah,* 87 F.3d 1266, 1269 (11th Cir. 1996) (because a finding of deliberate indifference requires a finding of the defendant's subjective awareness of a risk, "a genuine issue of material fact exists only if the record contains evidence, albeit circumstantial, of such subjective awareness.")

1. Defendant Gloria Babcock

Gloria Babcock was an adoption worker for DCF from 1987 until 1991. From 1991 until 1995, she was a protective investigator, and from 1995 to 1998 she was an investigation supervisor. (Doc. No. 80, Filed on May 28, 2004, Babcock Depo, p. 5) Babcock was the adoption worker assigned by DCF to Plaintiff in June of 1989. (*Id.* at 35) After Plaintiff's adoption was finalized on February 28, 1991, Ms. Babcock no longer had any duties pertaining to Plaintiff. (*Id.* at 117)

While Babcock does not recall the facts of Plaintiff's case due to the passage of time, the records reflect that Babcock had regular contact with Plaintiff and his caregivers throughout the period she was assigned to his case. Babcock documented problems with Plaintiff and followed up with services. For instance, when Babcock learned of Plaintiff's seizures, she instigated follow up care by Children's Medical Services; when Davis early in the placement expressed feelings of being overwhelmed by parenting three children, Babcock initiated family counseling sessions that lasted from the time of foster care placement with Davis until the final

adoption. The records of that counseling do not reveal any matter that would have alerted Babcock to abuse of Plaintiff. Babcock also provided a more experienced parent to be a "buddy parent" to work with Ms. Davis. (*Id.* at 114, 123, 125, 127, 130) Babcock noted in her reports on several occasions over the several months leading up to the final adoption that Ms. Davis reported she no longer felt overwhelmed, that the family was doing well, and that the counseling sessions were continuing. Plaintiff had also been enrolled in 4C daycare, and Babcock communicated with the daycare center. (*Id.* at 29, 100) The 4C daycare did not report to her a suspicion that Plaintiff was abused. (*Id.* at 39, 126) Nowhere in the records which Babcock generated while she was Plaintiff's adoption worker is there any reference to abuse or suspicion of abuse of Plaintiff.

Babcock testified that she reviewed the December 1990 Child Protection Team report in which Dr. Villadiego, while examining Plaintiff for admission to the hospital for pneumonia, had noted the suspicion of abuse due to marks on Plaintiff's back and buttocks. *Id.* at 24.[3] It was unclear

3. On her client contact log, Babcock wrote "12/3/90 TC-from Mrs. Davis informing me Omar is in the hospital because of seizures - child is stable; test are being done to discover why he has seizures." (Doc. No. 76, Ex.) There is no entry in Babcock's records for the period of December 21, 1990, and the next entry is for January 2, 1991. The records of Babcock's notes throughout the time she was assigned to Plaintiff reflect entries for problems concerning Plaintiff and her response such as getting the family counseling, suggesting the CMS examine Plaintiff to determine the cause of a previous seizure, and finding a "buddy parent" for Mrs. Davis. Babcock noted in her deposition that there was no record of a home visit to the

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from the context of her deposition when she reviewed this report, recently before or at the deposition or at the time described in the report in 1990. In any event, she conducted another home visit at the Davis home with Ms. Davis and the children present on January 18, 1991 after the date of this CPT report.[4] In her report of that visit she noted that the family was continuing in counseling and doing well, that Mrs. Davis continued to accept each child for who they are, that Omar continued to have seizures and the origin remains unknown, and that Joann continued to grow as a parent. (Doc. No. 76 Ex. F)

Babcock testified that at no time before the adoption of Plaintiff by Davis was finalized did she know of any abuse he suffered in the Davis home. (Doc. No. 80 p. 24) At no time before the adoption was she concerned about Plaintiff's safety in the Davis household. If she had been, she testified she would have removed the children and disrupted the adoption as she had done in other cases. (*Id.* at 131-32) She noted that allegations of child abuse sometimes are not true. (*Id.* At 72)

There is nothing in the record to show that Babcock did review a report of Raul Moringlane concerning his December

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Davis family in December of 1990 and that could be because Plaintiff had been admitted to the hospital and she did not know the length of time he was there or because she was on vacation. (Depo. of Babcock, Doc. 80 at p. 122.)

4. The CPT report is dated January 14, 1991. It describes the incidents of December 21 and December 24, 1990.

1990 investigation of the marks on Plaintiff's back and buttocks or that she had been given notice of a report of suspected child abuse before the adoption of Plaintiff was finalized in February of 1991. The CPT report is dated January 14, 1991, just four days before Babcock's final home visit to the Davis home. The CPT report was done some 14 years ago, and much of what occurred with reference to Plaintiff's placement cannot be independently recalled without the use of the documents to refresh Babcock's recollection. Raul Moringlane, the DCF Child Protection Investigator, testified that his usual practice was to advise the adoption counselor of a CPT report of suspected child abuse. (Doc. 78, Depo. Of Moringlane, p. 34)

If the report was read by Babcock at the time of the incident and before the final adoption, and there is no reference in her notes to being advised of such incident, it would be reasonable to assume from the contents of the report that Mr. Moringlane, whose job it was to investigate allegations of child abuse to wards of the DCF, had investigated the matter and determined there was no basis to believe Ms. Davis had abused Plaintiff.[5] The CPT report

5. Mr. Moringlane testified that the Child Protection Team sent his office a copy of the report, and then his office would send a copy to the service unit which was caring for the child, in this case the adoptions unit, unless the report was delivered after the case had been closed. In that event, and he testified that he believes this case was closed as unfounded for reasons explained below, the report was sent directly to closed files and was not sent to the service unit caring for the child. (Doc. No. 78, Depo. of Morninglane, pp. 31-32) He stated that the CPT report sometimes came in two to three months after the date of the initial incident, and he had no idea when

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states Davis initially on December 21, 1990 responded that she did not know about the marks and reported three days later that they were caused when an 11 year old sibling hit Plaintiff with an electrical extension cord from a deep fry. Further the report states that the examining physician could not make an evaluation regarding the consistency of the injuries with the history provided, and that Mr. Moringlane, whom Babcock knew, had reported that the police would not be involved in the case due to the lack of supporting evidence that abuse had occurred by a caretaker. (Doc. No. 87, Ex. # 1435-1440) In any event Babcock conducted another home visit of the Davis family in January of 1991 after the date of the report of suspicion of abuse.

Babcock was also responsible for conducting a home study on the needs of the Plaintiff. *Doc. No. 80, Depo. of Babcock, p. 42)* She is not certain whether she actually conducted the study, and the study is not in the record. Furthermore, it is unclear whether Babcock conducted a study to assess Davis' ability to raise three children, but Babcock claimed that she would have discussed the placement decision with her supervisor, Cindy Morales. (*Id.* at 42, 43) While Babcock's testimony indicates that she is uncertain as to whether certain home studies were conducted, the record does illustrate that Babcock completed an evaluation of Davis' ability to parent an older child in August 1988 and an

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the CPT sent a copy of the December 1990 report on Plaintiff to his office. (*Id.*) Since the incident described in the CPT report occurred in late December of 1990, and the adoption of Plaintiff occurred in February of 1991, some two months later, the record is devoid of when, if ever, Ms. Babcock learned of this matter.

evaluation of Davis' ability to parent a younger child in February 1989. (Doc. No. 76, Ex. A & B) Babcock also testified that home studies may not be child specific. (Doc. No. 80, Babcock Depo, p. 8) In addition, Babcock was required to do judicial reviews every six months. (Doc. No. 80, Depo. of Babcock, p. 44) Babcock's notes on her contacts with the Davis children and Davis throughout the period from November 1989 when Plaintiff was placed in the Davis home through February 28,1991 when Plaintiff was adopted indicate generally that Davis, the other Davis children, and Plaintiff were adjusting and doing well. (Doc. No. 76, Ex. F) While problems with the children and Davis were noted by Babcock in her records, there is no reference to a suspicion of child abuse.

In attempting to show that there are genuine issues of material fact on the issue of deliberate indifference relating to Babcock, Plaintiff points to the following facts: 1) the failure to conduct a home study, 2) Babcock's knowledge of the Child Protection Team report, and 3) Babcock's knowledge of Davis' prior failed adoptive relationship with the 13-year old girl.

Plaintiff argues the failure to conduct a home study on Plaintiff in the Davis home as evidence that Babcock deliberately disregarded a risk of harm to Plaintiff by Davis. The record, however, indicates only the possibility that the home study was not conducted, not that such study did not in fact occur some 15 years ago. Assuming that Babcock failed to conduct an official home study with respect to Plaintiff's placement with Davis or with respect to Davis' ability to be a parent to three children, Babcock had already

done two other home studies that gave a positive rating to Davis' parenting abilities for an older and younger child. The second home study occurred nine months before Plaintiff was placed with Davis in foster care, and Babcock regularly was in contact with Davis and Plaintiff, conducting monthly home visits throughout the period of over a year before the adoption. Further, Babcock had been familiar with Davis and her home, at least since August of 1988, because of a prior placement of a special needs child with Davis. Because the two home studies done by Babcock found Davis' parenting abilities to be acceptable, the absence of a third home study does not show that Babcock possessed actual or subjective knowledge of a known risk of child abuse of Plaintiff by Davis. In fact, Babcock came to the exact opposite conclusion in her reports and decided that Davis was a good parent. This decision was within Babcock's discretionary authority even though she may have been wrong. Babcock's own notes and contacts with Davis and the children, dated from the placement of Plaintiff in the Davis home until the date of his adoption in February of 1991, indicate a positive adoptive home situation. (Doc. No. 76, Ex. F). While Babcock may not have conducted the appropriate home study specific to Plaintiff's placement and the placement of his brother and a third child, failure to follow departmental guidelines and procedures amounts to mere negligence, not deliberate indifference to the risk of abuse to Plaintiff under the facts of this case.[6] *See Taylor v. Ledbetter,* 818 F.2d 791, 798-800

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6. It is unclear what Plaintiff contends a home study of Plaintiff and Davis would reveal. Such study would have been done before placement of Plaintiff with Davis in November 1989. There is no suggestion of suspected child abuse by Davis asserted until December

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(11th Cir. 1987); *see also Ray v. Foltz*, 370 F.3d 1079, 1085 (11th Cir. 2004).

There is an absence in the record of evidence that Babcock had knowledge of the Child Protection Team report of December 1990 or that Babcock had actual knowledge of abuse of Plaintiff or a substantial risk of such abuse. If Babcock did have knowledge of the contents of Child Protection Team report on or about the date it was generated, Babcock would have actual knowledge of a risk to Plaintiff of child abuse. However, assuming for the sake of analysis that Babcock knew of the CPT report, the record does not show that Babcock disregarded the risk of harm to Plaintiff by conduct that was more than negligent. The CPT report indicates that the DCF investigator whose responsibility was to investigate allegations of child abuse to children in the custody of DCF found that there was a lack of evidence that Davis abused Plaintiff and that the marks were caused by Plaintiff's brother. The report indicates that the investigator stated the children were not taken from the home, and follow up services were to be provided by DCF. The records show that Babcock had contacts with the family after the date of the CPT report and in January of 1991 conducted another home visit in the Davis home where her practice was to talk to the family group and to the mother and the children separately. Davis and the children continued in family counseling. Thus assuming that Babcock had actual or subjective knowledge of a suspicion of child abuse from the

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of 1990. There is no evidence of record to suggest that an additional home study would determine Davis to be unfit as a parent or that it would reveal abuse of Plaintiff.

CPT report, her conduct after such report was within her discretionary authority as an adoption counselor for DCF and at most would amount to negligence, not deliberate indifference to Plaintiff's right to be safe and secure in his placement with Davis.

In addition to the Child Protection Team report and the possible failure to conduct a home study, Plaintiff also points to Babcock's knowledge of the failed Davis adoption of the thirteen year old girl, Melissa, before Plaintiff was placed in the Davis home and the 1988 adoptive home study relative to Melissa as evidence of Babcock's deliberate indifference to Plaintiff's abuse in 1990. While the 1988 adoptive home study indicates Davis' hesitancy to adopt very young children, the report does not conclude that Davis was incapable of caring for a young child like Plaintiff. (Doc. No. 78, Ex. A) The report indicated the reason for this statement, that because of her age, Ms. Davis preferred to adopt an older child. Furthermore, the 1989 home study indicated that Davis was capable of adopting and caring for a young child, and this home study also referenced Ms. Davis' desire to have the opportunity to nurture a younger child.

Although the 1988 adoption procedures for the thirteen year old ultimately terminated, Babcock's notes do not indicate that the termination was caused by Davis' poor parenting skills or by an abusive situation. (Doc. No. 76, Ex. C). In fact Babcock's notes reflect that Melissa, who had been sexually abused prior to her placement with Davis and was continuously in counseling during this placement, had been acting out sexually, including going into a dark area with a boy at Davis' church. Additionally, the records

generated by Babcock reflect that there had been problems with Melissa, including refusing to obey and talking back. Perhaps a further investigation into the failed adoption would have been wise, but the failure to conduct such an investigation does not rise to the level of showing that Babcock was deliberately indifferent to Plaintiff's right to be secure from abuse.

Knowledge of a suspicion of abuse, coupled with (1) personal knowledge of a positive adoptive home situation over an extended period of time, (2) regular contact with the child and the adopting parent, (3) regular interventions to provide support for the parent and the child and medical care for the child, (4) a report that reflects the DCF investigator found a lack of supporting evidence that the caretaker committed abuse of the child in the single incident alleged, (5) a failure to conduct a third home study when two prior home studies had been completed, regular home visits and telephone contacts were conducted, including one home visit after the date of the report of suspicion of abuse, and regular conferencing of the case with the adoption worker's supervisor occurred, (6) regular contact with and knowledge of the adopting mother from at least August of 1988 through February of 1991, the date of the child's adoption, and (7) knowledge of a prior placement of a sexually abused teenager that did not result in an adoption do not rise individually or collectively to the level of actual knowledge of abuse, or the risk thereof, or of deliberate indifference towards abuse or the constitutional right of Plaintiff to be safe.

In summary, Defendant Babcock has shown that her acts of placing Plaintiff with Davis and supervising that placement

until adoption were within the scope of her discretionary authority as an adoption counselor of DCF. She has affirmatively testified that she did not have any knowledge or evidence of the abuse of Plaintiff before the adoption. Plaintiff has failed to show that Babcock had actual knowledge of the abuse, or that if she was aware of the CPT report of December 1990 and therefore had subjective knowledge of a possibility of a serious risk of abuse, that she deliberately disregarded that risk by conduct that was more than negligent. Thus, Defendant Babcock is entitled to qualified immunity.

2. Defendant Raul Moringlane, Jr.

Plaintiff argues that Defendant Moringlane exhibited deliberate indifference towards Plaintiff's risk of child abuse at the hands of Davis only as to the report of suspected abuse in December of 1990.

Raul Moringlane, Jr. is currently a Child Protective Investigator Supervisor at DCF. (Doc. No. 78, Moringlane Depo., p. 4). He has held that position since last year. (*Id.*) Prior to that time, and during December of 1990, he had been a DCF Child Protective Investigator for approximately 17 years. (*Id.* at 5) As Child Protective Investigator, Moringlane conducted investigations of suspected child abuse when a report came through the abuse hotline. (*Id.*)

Moringlane's only involvement with Plaintiff was as a Child Protective Investigator concerning the December 1990 report of suspected abuse, and he has no independent recollection of the case. (*Id.* at 6-7) The CPT report states

"Department of H.R.S. Protective Investigator, Raul Morninglane was assigned to investigate the home situation and allegations of physical abuse." (*Id.* at Exhibit 4, Ex. # 1439) Moringlane does not dispute that he was responsible for conducting the investigation into the allegations of Plaintiff's abuse in December of 1990.

Moringlane does not recall if he talked with Dr. Villadiego, Plaintiff's brother, or Dr. Fahy. (*Id.* at 10, 24) He does not recall what procedures he followed for this case or if he followed appropriate investigative procedures. (*See Id.*) He looked for his file on this incident but could not find it in the DCF records. The DCF file would contain the notes, the "chronos", the report of the investigation, and the findings in the case. (*Id.* At 7) Moringlane stated that he is unable to locate the report in the computer, has no idea where his notes of the actual investigation are located, and has no personal knowledge as to what his findings were. (*Id.* at 7, 13) Based on the fact that no DCF record of the investigation exists, Moringlane stated that the case must have been closed as unfounded and the record purged. (*Id.* at 13) Moringlane notes that if the record is expunged, it means he likely concluded that the marks were not caused by child abuse. (Doc. No. 78, Moringlane Depo., pp. 12,13).

Plaintiff argues that Moringlane's knowledge of the marks on Plaintiff's back illustrates actual knowledge of a risk of child abuse to Plaintiff by Davis. Defendant Moringlane responds that while he may have had actual knowledge that there were marks on the Plaintiff's back, there is no evidence that he had knowledge that the marks were the result of child abuse by Davis. Moringlane stated he

would have been aware of the markings reported on Plaintiff's body, and that each investigation takes place on a case-by-case basis. There are a number of criteria that DCF uses to ensure that an investigation is accurate. For instance, the investigation should commence on time, the victim and alleged abuser should be interviewed, and the investigator should collect information from collaterals or relatives that have knowledge of the family. (*Id.* at 6) If a caretaker is responsible for the injuries, then the child may be removed from the caretaker. (*Id.* at 17) If a sibling inflicts the injury, then other steps may be taken to protect the victim child. (*Id.* at 18) In a case of sibling-inflicted injury, the DCF official would talk to the parent to ensure that the children were supervised. *Id.* He testified in the abstract as to the procedure followed. If there was a report of suspected child abuse and the child has belt type marks and bruises on his body, he would talk to the doctor, talk to the caretaker, see the child and the bruises, ask the child what happened if the child is able to talk and give an explanation, and if the child pinpoints a particular person as the one who caused the injuries, he would determine who the person was and the relationship of the person to the child, talk to that person, and determine from the circumstances if the injuries were accidental or child abuse. (Doc. No. 78, pp. 10,14-18, 22, 29) If there was abuse by a caretaker, steps would be taken to protect the child. (*Id.*) If another child caused the injury, the caretaker would be instructed not to leave the two children alone or to take actions to protect the child from the child causing the injury. (*Id.* at 18) He would visit the home, speak with the physician and anyone with knowledge, check prior hospitalizations, and talk with siblings. The fact that a child is admitted to the hospital because of pneumonia, or a child is admitted to the

hospital because of seizures, or a child is admitted to the hospital because of dehydration does not mean there has been child abuse. (*Id.* at 14-15) Further the fact that a child has marks on his body, a bruise, or a broken arm does not necessarily mean the child has been abused.[7] (*Id.* at 16) If he

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7. Moringlane was asked about the two different statements given by Davis as to the marks on Plaintiff, first that she did not know about them, and then 3 days later that they had been cause by a sibling using the cord to an electric deep fry. He stated:

> Well, it's not surprising to see that happening. A lot of times children are injured and sometimes parents don't know what happened. For example, child spends time with the grandparents, a toddler. And the grandparent is helping that child to walk, as the child is trying to walk, trips. And the grandparents —the reaction is to pull to child right away. That child might end up with a fracture of the left arm or right arm, whatever.
>
> The parents don't know anything about it. The child ends up next day in the emergency room and they asked the parents, the child has a fracture, what happened? And the parents may say, I had no idea. I don't know what happened. So there have been situations in which there have been injuries to a child that a parent had no knowledge as to that injury happening.
>
> And parents, they don't do body checks all the time on their children. Some parents may do it, some parents may not. We've seen situations in which the child has had injuries and the parents weren't aware of it or the caretakers were not aware of it.

(Doc. No. 78, Depo. of Moringlane, pp 26-27)

received a report of abuse because of any of these conditions, then he would investigate it. (*Id.* at 14-18)

Based on the record, the Court finds that Defendant Moringlane did have actual knowledge of a risk of child abuse to Plaintiff by Davis. Moringlane received in some manner a report of suspected child abuse of Plaintiff in December of 1990. From the contents of the written report, Moringlane knew that Plaintiff had loop marks on his back and buttocks. Therefore Moringlane had actual knowledge that Plaintiff could have suffered abuse from a third person, including Davis.

While Moringlane has no memory of this report of suspected child abuse and the DCF record of an investigation is no longer available, he points to the CPT report itself, which is the basis of Plaintiff's claim against him, as evidence that he investigated the report of suspected child abuse and found no evidence of abuse of Plaintiff by Davis. (Doc. No. 78, Depo. of Moringlane p. 3). On page 2 of the CPT report the following is stated:

> . . . According to P.I. Morninglane, Adoptive services will follow the family to assess needs and arrange any services needed in the home. Mr. Morninglane had not examined the extension cord in the last conversation with him, but stated he would visit the home and measure it . . .
>
> In further conversations with P.I. Morninglane, he reported that O.P.D. would not be involved in the

> case at this time due to the lack of supporting evidence that abuse had occurred by a caretaker.

(*Id.* at Ex. # 1435-1440) Moringlane testified that because Plaintiff stayed in the home and adoption services were to follow up, he must have determined that Plaintiff was not a victim of abuse by his caretaker. (*Id.* at 35) He stated "The fact that he was left there at the home, I must have concluded during my investigation that Omar was not subjected of (sic) abuse by the caretaker." (*Id.* at 45) The CPT report also reflects that there had been more than two conversations with Moringlane about the report of suspected abuse of Plaintiff.

Plaintiff has failed to elicit facts demonstrating that Moringlane disregarded the risk of child abuse to Plaintiff by Davis by conduct that is more than mere negligence. While Plaintiff argues that loop marks illustrate an abusive situation *per se,* Moringlane testified that such investigations take place on a case-by-case basis, and, in this instance, he likely concluded that the situation in the Davis home was not abusive. *Id.* at 13, 17-18. While Moringlane's conclusion may be contrary to what actually occurred in the Davis home, based on the facts of record in this case, Moringlane cannot be found to be deliberately indifferent to Plaintiff's situation merely because in the exercise of his discretionary authority he reached a conclusion that there was lack of supporting evidence that abuse of Plaintiff caused by Davis occurred in the December 1990 incident. At most the evidence of record raises an inference of negligence of Moringlane but not deliberate indifference to a known risk of child abuse of Plaintiff by Davis.

Appendix

In his memorandum in opposition to summary judgment, Plaintiff argues that if Moringlane had done everything as detailed in his normal investigation and still concluded that there was no abuse, that in itself would be evidence of deliberate indifference to Plaintiff's clearly established right to be free from harm. (Doc. No. 87, p.16) In short, Plaintiff's argument can be summarized as follows: First, belt-type markings on Plaintiff's body conclusively illustrate that abuse took place. Second, if Moringlane followed appropriate investigative procedures, then Moringlane would have discovered that Plaintiff was abused by Davis. Therefore, Moringlane's deliberate indifference can be inferred from the fact that in conducting the investigation Moringlane failed to conclude there had been abuse of Plaintiff by Davis[8]

However, under the law once Moringlane has shown that he acted within the scope of his discretionary authority, it is the Plaintiff who must produce facts showing that Moringlane had actual knowledge that plaintiff was being abused or that Moringlane deliberately failed to learn of the abuse and

8. Plaintiff's argument that the failure after investigation to find abuse when abuse actually occurred equals deliberate indifference towards the abuse would result in the articulation of a new standard under which public officials could be exposed to widespread liability. There may be instances where officials conduct a proper and appropriate investigation and conclude that there is no abuse, when abuse has in fact occurred. Without the requirement that Plaintiff must produce direct or circumstantial evidence pointing to subjective awareness of the abuse by the official and deliberate disregard of that risk by conduct that is more than mere negligence, the burden would rest on the public official to prove that he was not deliberately indifferent. Such standard, if adopted, would ultimately defeat the public policy reasons behind qualified immunity.

disregarded the risk to Plaintiff by conduct that is more than mere negligence. Plaintiff has failed to point to any facts which illustrate that Moringlane failed to conduct a proper investigation. Plaintiff merely alleges that Moringlane failed to follow investigative procedures, but mere allegations are not enough to survive a motion for summary judgment.

Plaintiff also argues that the absence of the written record of Moringlane's investigation of the December 1990 report of suspected child abuse shows that Defendants were deliberately indifferent. Defendants respond by pointing to the 12 year lapse of time between the placement of Plaintiff for adoption with Davis and the filing of the lawsuit and the policy of the DCF, pursuant to statute, to destroy records of investigations of child abuse deemed to be unfounded as the reasons for the absence of the record of the investigation in this case.[9] Under the statute, if a report of abuse is confirmed,

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9. Florida Statutes Section 415.504 dealing with the retention of records by DCF states:

> Upon completion of its investigation, the local office of the department shall classify reports as "confirmed," "indicated," or "unfounded." At this time the department shall notify the parent or guardian of the child, the child if appropriate, and the alleged perpetrator, if other than the child's parent or guardian, of the completion of its investigation of the report and whether the report is classified as "confirmed," "indicated," or "unfounded." All identifying information in the central abuse registry and tracking system or other computer systems or records that is related to unfounded reports shall be expunged 1 year after the case is classified as

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the report must be retained for 50 years. If it is deemed unfounded, it is expunged in one year.

The Court found only one case dealing with the absence of a record in the context of a case involving the defense of qualified immunity, *Scicluna v. Wells,* 345 F.3d 441 (6th Cir. 2003). While in that case qualified immunity was not found to exist, the Sixth Circuit noted that Defendant had failed to offer any reason for the absence of documentary evidence. *Id.* at 446-47. In the instant case, Defendants have offered a reason why the records of the December 1990 investigation

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> "unfounded." All identifying information in the central abuse registry and tracking system or other computer systems or records that is related to an indicated report shall be expunged from the central abuse registry and tracking system 7 years after the receipt date of the last indicated report concerning any person named in the report. Computer records of a confirmed report shall be retained for 50 years from the receipt date of the report. All information, other than identifying information, related to indicated or unfounded reports at the time of expunction shall be disposed of in a manner deemed appropriate by the department and pursuant to §§ 119.041 and 257.36(7). Unfounded reports shall only be indexed by the name of the child to detect patterns of abuse or neglect. Persons named in the unfounded or indicated reports shall not be identified as perpetrators. All information in the central abuse registry and tracking system or other computer systems or records shall be subject to the confidentiality provisions in s. 415.51.

FLA. STAT. ANN. ¶ 415.504©)(1990).

are missing. That reason comports with the content of the CPT report which noted Moringlane's statement that there was a lack of evidence that Davis abused Plaintiff.

Therefore Plaintiff has not proven that the absence of the record of Moringlane's investigation of the December 1990 report of suspected child abuse shows deliberate indifference by a Defendant.

In summary, Moringlane has shown that his conduct in conducting the investigation of the report of suspected child abuse of Plaintiff in December of 1990 and coming to a conclusion that there was a lack of supporting evidence that Davis abused Plaintiff was within the scope of his discretionary authority as a Child Protection Investigator of the DCF. He has also shown that after the passage of time, records concerning such an investigation are purged by DCF. Plaintiff has failed to show that the investigation by Moringlane did not occur or that Moringlane lacked good faith in conducting it. Since Plaintiff bears the burden of proof and has failed to produce evidence, either direct or circumstantial, showing that Moringlane was deliberately indifferent to a known risk of child abuse suffered by Plaintiff at the hands of Davis, Defendant Moringlane is entitled to the bar of qualified immunity.

3. Defendant Cindy Morales

Cindy Morales has been working for the DCF since November of 1978. (Doc. No. 74, Ex. A, p. 1). On December 8, 1981, Morales was promoted to supervisor in the adoptions unit. *Id.* As supervisor in the adoptions unit, Morales

supervised Gloria Babcock, Plaintiff's adoption counselor, until July 23, 1990 when Morales was promoted to program specialist. *Id.* at 2. After that date, Morales no longer had responsibility for adoption counselors. *Id.* at 2-3.

During the period of time that Morales was Babcock's supervisor, Morales was supervising approximately ten to fifteen adoption counselors, each of whom was assigned fifty to eighty adoption cases. *Id.* at 3. In her affidavit, Morales states that it was her practice to meet with adoption counselors on a monthly basis to review their cases.[10] *Id.* Morales relied upon adoption counselors to advise her of problems and concerns with children assigned to them. *Id.* It was not part of her employment duties to make visits to the homes where children were placed, and she did not have direct contact with the children or adoptive parents. *Id.* at 3, 15.

Morales would have supervised Babcock from June of 1989 to July 23, 1990 when she was promoted. In addition, the records reflect that on September 12, 1990 she was asked to chair an Administrative Review Conference on Plaintiff's case. She cannot recall Plaintiff's case, or Plaintiff, or Davis. (Doc. No. 99, Depo. of Morales, pp. 10, 14, 15, 25, 26, 48.). She testified that after 23 years, some cases tend to blend into each other. (*Id.* at 48)

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10. In her deposition testimony, Morales stated that she tried to sit down on a monthly basis with each of her adoption counselors and go over their cases to make sure that children were not falling through the cracks or their cases were not getting sidetracked. Doc. No. 99, Depo. of Morales, p. 36.

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There is no evidence of record to show that Morales had actual knowledge of child abuse of Plaintiff or had any reason to suspect that Davis was abusive to Plaintiff. Babcock's records do not document any suspected abuse, and nothing in the files produced show any reason for Morales to have suspected or been aware of abuse. Babcock testified that she had no knowledge of or suspicion of abuse of Plaintiff by Davis before his final adoption. Since Morales relied on Babcock to advise her concerning each child Babcock supervised, if Babcock had no knowledge of abuse, it follows that Morales could not have such knowledge, directly or subjectively, either. Even if Babcock had actual or subjective knowledge of abuse, Morales cannot be held liable to Plaintiff under respondeat superior, a theory of negligence. Further, Morales testified affirmatively that she had no knowledge of or suspicion of abuse of Plaintiff. (Doc. No. 74 pp.16-18, 20, 22-23).

Morales has testified that she had no knowledge that any required home study had not been done on Plaintiff. (Doc. No. 74 p.19) She stated that if there were a sibling group placement, there should have been an adoption home study to assess such things as the family and its strengths and weaknesses, how the family can meet a child's needs, and what type of children they were. (Doc. No. 99, Depo. of Morales, pp. 22-23.) The policy dictates that a home study is done for each child identified, and the adoption home study is contained in the child's adoption file, if the adoption was finalized, which file is sealed by law. (*Id.* at 21)

Plaintiff has not shown facts, either direct or circumstantial, illustrating that Morales had an actual or

subjective knowledge of a risk of child abuse to Plaintiff by Davis.

In an attempt to create a genuine issue of material fact, Plaintiff highlights contradictions between Morales' affidavit and Morales' deposition testimony in which Morales testified as a witness in a suit by Plaintiff against DCF. First, Plaintiff points to Morales' deposition testimony in which Morales testified that she was a unit supervisor for the adoptions unit and was promoted to program specialist in the family safety program office where it was her responsibility to oversee adoptions and revenue maximization. (Doc. No. 99, Depo. of Morales, pp. 4-5) Plaintiff emphasizes that this deposition testimony directly contradicts Morales' affidavit where Morales flatly denies being the specialist for foster care, adoptions, and revenue maximization. (Doc. No. 74, Ex. A, ¶14).

Second, Plaintiff notes that Morales, in her affidavit, claims to be unaware whether a required home study was done. (Doc. No. 74, Ex. A., ¶19). However, in her deposition testimony, Morales acknowledged that there had to have been an approved home study prior to placement of a child. (Doc. No. 99, pp. 41-434). It is the responsibility of the unit supervisor and program specialist to review the home study. *Id.*

Finally, Plaintiff argues that Morales testified in her affidavit that it is unlikely that she would have participated in the Administrative Review Conference of September 1990 which occurred after she was promoted. (Doc. No. 74, Ex. A., ¶21) This statement contradicts Morales' deposition

testimony in which Morales admitted it was likely that she had participated in the conference because her signature appeared on the Administrative Review Conference Report. (Doc. No. 99, p. 39)

Even if the Court assumes that Morales was the specialist on adoptions, foster care, and revenue maximization, Plaintiff does not explain why this fact is significant in the deliberate indifference analysis or how this shows that Morales has actual subjective knowledge of a risk of child abuse to Plaintiff. Second, assuming that Morales knew that DCF did not conduct the appropriate home study prior to the placement of Plaintiff with Davis in 1989, such fact could be proof of negligence at most, not proof that Morales possessed actual or subjective knowledge of a risk of child abuse to Plaintiff by Davis over a year later.

While conducting a home study is a common policy of the DCF prior to placing a child in an adoptive home, the Eleventh Circuit has held that allegations that foster care officials have not followed certain departmental procedures states a claim for violation of one's right to procedural due process. *Taylor v. Ledbetter,* 818 F.2d 791, 798-800 (11th Cir. 1987); *See also Ray v. Foltz,* 370 F.3d 1079, 1085 (11th Cir. 2004). Allegations that a public official has failed to follow appropriate state policies and procedures do not support a claim for damages. *Ray,* 370 F.3d at 1085. Thus, assuming that Morales had knowledge that the appropriate home study was not conducted, this would merely illustrate negligence or a procedural due process violation, but would not show that Morales possessed actual or subjective knowledge of a risk of child abuse to Plaintiff by Davis.

Further, the Administrative Review Conference was to review the status of cases and determine what services are needed. (Doc No. 99, p. 39) Assuming that Morales had in fact participated in the conference, there is nothing in the record to show that a suspicion of abuse of Plaintiff had been raised in such conference. The conference was some 3 months before the December 1990 incident and before the January 14, 1991 Child Protection Team report. Morales testified that her participation in an Administrative Review Conference after she was promoted in July of 1990 would have been at the request of the Unit Supervisor, and her role would be as a third party to make sure the correct questions were asked. (Doc. No. 99, Depo. of Morales, p. 38-40) She had no responsibility for the adoption worker, the cases, or the adoption supervisor. *Id.*

In summary, Defendant Morales has asserted the defense of qualified immunity and has shown that she was acting within her discretionary authority as a supervisor in the adoptions unit from June of 1989 to July 23, 1990 and as program specialist at the time of the Administrative Review Conference on September 12, 1990. Plaintiff bears the burden to prove facts showing that Morales had actual knowledge of the risk of harm to Plaintiff or was deliberately indifferent to such risk. *See McElligott v. Foley,* 182 F.3d 1248, 1255 (11th Cir. 1999). This Plaintiff has failed to do. There is no evidence of record that Morales had actual or subjective knowledge of a risk of child abuse to Plaintiff by Davis. Conflicts between testimony of a defendant in an affidavit and in a deposition on matters which do not show a risk of child abuse do not render the witness unbelievable or support Plaintiff in his burden of proof. Plaintiff's argument that

Defendant Morales is liable on a theory of respondeat superior for the acts and knowledge of her subordinate, Gloria Babcock, also fails in a qualified immunity analysis. The failure to conduct a home study on Plaintiff in 1989 on this record is at most a showing of negligence, not deliberate indifference. Thus, Defendant Morales is entitled to qualified immunity because Plaintiff has failed to produce facts, either direct or circumstantial, illustrating that Morales had actual or subjective knowledge of, and deliberately disregarded by conduct that was more than negligent, a known risk of child abuse suffered by Plaintiff at the hands of Davis.

4. Defendant Bruce Rowley

Bruce Rowley has worked for DCF for approximately 32 years. (Doc. No. 79, Filed on May 28, 2004, Rowley Depo, p. 4). Rowley succeeded Morales as the Adoptions Supervisor in August of 1990 when Morales was promoted. He became a court liaison in 1995. *Id.* When he became involved in Plaintiff's case in August of 1990, Plaintiff had already been placed in the Davis home[11]. (*Id.* at 5, 10) He does not recall much about the case because of the years that have passed. (*Id.* at 6)

As adoptions supervisor, Rowley was responsible for ensuring that DCF was doing the best job possible in placing

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11. Since Rowley was not involved in the original placement of Plaintiff with Davis, he did not have knowledge of a home study. However, he testified that adoptive home studies were valid for a year, and he could not recall if a home study had to be updated prior to a placement if one had already been done. (Doc. No. 79, p. 10) Linda Radigan in her affidavit testified that a home study was required.

a child for adoption. (*Id.* at 5) He relied on the adoption counselors, such as Gloria Babcock, who were expected to have full information about children assigned to them and were expected to share that information with their supervisor. (*Id.* at 8) Rowley does not recall direct contact with the Plaintiff, Davis, or the Davis home, and he was not responsible for having direct contact with or supervision of the prospective adoptive parent or personally inspecting the adoptive home. (*Id.* at 93) While he was not involved in the placement of Plaintiff in the Davis home, Rowley stated that the Adoptions Supervisor is responsible for monitoring the placement and determining whether it is appropriate in the period leading up to finalization of the adoption. (*Id.* at 10) Allegations of neglect and abuse of a child are investigated by another department. (*Id.* at 11)

Rowley admitted that he was present at the September 12, 1990 Administrative Review Conference for Plaintiff, but he does not recall it or what was discussed. (*Id.* at 56) The record of that meeting does not reflect that Plaintiff had problems with seizures. (*Id.* at 57-58; Ex.# 6411-6472) Rowley stated that he does not recall but he probably knew of Plaintiff's seizures, dehydration, and hospitalizations in 1990 and would have considered this information prior to signing the Consent to Adoption form for Plaintiff on January 16, 1991. (Doc. No.79, Ex. 34) He testified that a child can be sick for many reasons, and it would not necessarily delay an adoption because the child had medical problems. (*Id.* at 20) The fact that a child has medical problems is not an alarm that there is abuse in the home. (*Id.* at 19)

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Rowley testified repeatedly that he does not recall seeing the December 1990 CPT report of suspected child abuse until recently in his attorney's office. (*Id.* at 63, 68, 88, 89, 91) Allegations of child abuse are investigated by the Protective Investigations Unit, another department at DCF. (*Id.* at 11) Normally the Child Protection Team or the DCF Investigative Unit would receive the report of suspected child abuse, and they might forward it to the adoptions counselor. (*Id.* at 16-17) Rowley does not remember if he talked to Moringlane, the CPT, or if he received a copy of the December 1990 CPT report. (*Id.*) Normally if a child under DCF supervision in an adoptive home is the subject of an investigation, the investigating unit should make the adoption counselor aware of it. (*Id.* at 21, 32) Further as to the 1990 CPT report of suspected child abuse, he testified:

> Again, from this file I noted, I don't recall being made aware of it. But what I did see in the file was that it was not a confirmed report; it didn't warrant removal of the child.

(*Id.* at 21) When asked if he knew what happened to the report of investigation of the December 1990 suspicion of child abuse, he stated that he believed unfounded reports at that time were eliminated, and that could be the reason that it is not showing up (*Id.* at 68)

Rowley testified that he had no knowledge prior to signing the Consent for Adoption that Plaintiff had been abused by Joann Davis, and he had no reason to believe that it was not a safe and appropriate adoption. (*Id.* at 93) After Plaintiff was brought back into the custody of DCF in June

of 1993, Rowley stated that what had happened with Davis and the children was discussed at the staffings, and there was no indication that such a situation involving abuse could have been predicted:

> Well, there was no indication that I was aware of. And there was —she had been approved as an adoptive parent. The counselor felt things were going well, so she proceeded to finalization. I mean, no one can foresee the future. But we certainly didn't predict anything like that.

(*Id.* at 24, 27)

As to the December 1990 report of suspicion of abuse, Rowley stated that he was not sure whether in December there was abuse because there was an investigation that was apparently unfounded, so he cannot say that the abuse began in December of 1990. (*Id.* at 75) As to the hospital record of Plaintiff's admission on December 21, 1990, (as opposed to the CPT report), Rowley stated he would say that it had not been determined at the time the report was written whether Plaintiff had been abused. (*Id.* at 95) There is an indication of possible abuse, that Plaintiff got hit or fell or struck something to have the bruises, but facts would have to be gathered to determine if it was in fact abuse. (*Id.* at 95-97)

After the adoption of Plaintiff was finalized in February of 1991, Rowley's duties as DCF Adoption Supervisor for Plaintiff's case terminated. (*Id.* at 18, 22)

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Rowley has asserted the defense of qualified immunity and has produced evidence that he was acting within the scope of his discretionary authority as Adoptions Supervisor with the DCF responsible for supervising Plaintiff's adoption counselor, Gloria Babcock, from on or about August of 1990 until the time that Plaintiff was adopted by Davis in February of 1991. The burden shifts to Plaintiff to establish that Rowley violated Plaintiff's constitutional right to a reasonably safe placement and living conditions.

In attempting to create a genuine issue of material fact, Plaintiff argues that Rowley attended the September 12, 1990 Administrative Review Conference and knew of Plaintiff's seizures, dehydrations, hospitalizations, other medical issues, and his resistance to baths, yet signed the Consent to Adoption form on January 16, 1991. (Doc. No. 87) Further Plaintiff argues Rowley should have considered the Child Protection Team Report of the December 1990 incident and that the marks on Plaintiff described in it were an indication of possible abuse of Plaintiff by Davis. (*Id.*)

There is no competent evidence in the record to support the contention of Plaintiff that seizures, dehydrations, hospitalizations, other medical issues, and aversions to baths are indications of child abuse. Further there is no evidence that Rowley knew of the report of suspicion of child abuse in December of 1990 or the January 14, 1991 CPT report, and he testified directly that he was not aware of the incident in December of 1990. (Doc. No. 79, Depo. of Rowley, p. 91) Plaintiff's argument that as adoptions supervisor, Rowley should have known of the December 1990 report of suspected abuse is based on a negligence theory of respondeat superior

and is inappropriate to an analysis of qualified immunity. There is no evidence of record that Rowley had actual knowledge of a risk of child abuse to Plaintiff by Davis.

Even assuming for the purpose of analysis that Rowley did know of the December 1990 incident before the adoption was finalized, the CPT report does not reflect that abuse of Plaintiff by Davis had occurred. To the contrary the report states the DCF's Child Protection Investigator, Mr. Moringlane, stated that there was a lack of evidence to support a conclusion that Davis had abused Plaintiff. Further, Rowley's duties required him to rely on the adoption counselors to provide him with information concerning children assigned to the adoptions unit since his duties did not include conducting home visits or having contact with the adopting parent or child himself. Rowley typically would discuss the propriety of placing the child in the home and typically would determine whether the parent was prepared for the final adoption through staffings which he held with his adoptions counselors, including Babcock. Information collected by Babcock generally indicated that Plaintiff and Davis were doing well. She documented problems which the children, including Plaintiff, and Davis had and sought solutions for such problems, including the seizures of Plaintiff. Rowley's signature is affixed to several of the records of Babcock's contacts with the Davis family and her reports, including the home visit reports that Babcock prepared for August through November of 1990. Rowley also signed the home visit record Babcock prepared of her visit to the home of Davis on January 18, 1991, a month after the date of the report of suspicion of child abuse, four days after the date of the Child Protection Team report, and a month

before the date of the final adoption. This report stated that the family was very outgoing, that Joann continued to accept each child for who the child was, that Omar continued to have seizures, the origin of which remained unknown, and that Joann continued to grow as a parent. The adoption counselor had been responsible for Plaintiff for some nineteen months and had been reviewing the home and parenting of Davis for at least two years when this report was written. On deposition she categorically denied knowledge of any abuse or suspicion of abuse of Plaintiff during this time. The family remained in counseling through the time of adoption without a report of abuse being presented by the counselor. Therefore even assuming that Rowley had knowledge of the December 1990 report of suspected abuse, Plaintiff has failed to show that Rowley was deliberately indifferent to such abuse by conduct that was more than negligence.

In summary, Defendant Rowley has shown that his acts were within the scope of his discretionary authority as DCF Adoptions Supervisor. Plaintiff has failed to show Rowley lacked good faith resulting in a constitutional violation. Thus, Defendant Rowley is entitled to qualified immunity because Plaintiff has failed to produce evidence, either direct or circumstantial, that Rowley had actual knowledge of, or deliberately disregarded by conduct that was more than negligent, a serious risk of child abuse suffered by Plaintiff at the hands of Davis.

Appendix

Motions to Strike

1. Defendants' Motion to Strike Affidavit of Linda Radigan

Defendants move to strike the affidavit of Plaintiff's expert, Linda Radigan. Ms. Radigan's testimony will be stricken insofar as that testimony contains conclusory legal statements as to the state of mind of Defendants. The Court will consider the portions of Ms. Radigan's testimony in which she states the policies or procedures of the DCF that were not followed by Defendants.

Federal Rule of Evidence 702 provides that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or date, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. However, if the jury does not need the assistance of an expert to understand the case, such as a person who simply recounts the facts and then offers an opinion as the to conclusion which the jury should reach, expert testimony is not allowed. *Montgomery v. Aetna Cas. & Sur. Co.*, 892 F.2d 1537, 1541 (11th Cir. 1990).

Plaintiff cannot rely on legal conclusions articulated by an expert to meet his burden of coming forward with relevant evidence. *See Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). In *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th

Cir. 1996), the plaintiff relied upon an expert affidavit to show that the defendant police officers knew or and disregarded an excessive risk that the plaintiff would suffocate after he was placed in the back seat of the police car. The affidavit of the plaintiff's expert stated that "it was well known by police on the day of [the decedent's] death improper restraint of arrested persons, particularly those on medication and/or who have engaged in strenuous activity, could quickly cause death by asphyxiation." *Id.* The Eleventh Circuit held that conclusory statements about an officer's mental state are not admissible. *Id.*

Ms. Linda Radigan states that she is a former official of the Florida Department of Children and Families, working at the central office from 1992 until 2002 and serving in various positions, including Assistant Secretary with responsibility for Florida Family Safety Program which operated the foster care system. She affirms that she has first hand personal knowledge of the statutes, rules, regulations, policies and procedures pertinent to Florida's foster care system and of the various job duties of foster system personnel. In that regard, she could be qualified as an expert witness to testify on the statutes, rules, regulations, policies and procedures pertinent to Florida's foster care system and the various job duties of foster system personnel of the Florida Department of Children and Families. She is not qualified as an expert on the state of mind of others, nor is her testimony necessary for the jury to understand the facts of the case or to determine the ultimate question, whether the defendants acted with deliberate indifference.

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Defendants have not challenged the qualifications of Ms. Radigan. However, the following paragraphs of Ms. Radigan's affidavit will not be considered by the Court because the statements contained in these paragraphs are legal conclusions on another person's state of mind for which Ms. Radigan has not been qualified by training or experience to testify:

¶ 1 "[E]ach of the Defendants consciously disregarded known signs of abuse."

¶ 13 "[T]he absence of the required planning and preparation sequence of events to place three young children with a single mother who just had one failed adoption attempt demonstrates reckless disregard by Defendants Babcock and Morales of the safety of the children of the harms already suffered."

¶ 14 "The absence of team consideration of: the prior failed adoption, lack of adoptive applicant training and Davis' rigid parenting style, and applicant's current financial hardship, reflect a deliberate indifference by staff to factors pertinent to the safety of Omar, reckless disregard by staff of known and relevant actions that would have better assured Omar's safety, stability and well-being. These periods also reflect a deliberate indifference by staff to known information that clearly portrayed safety threats to Omar."

¶ 27 "The lack of review and assessment that occurred prior to finalization of the adoption demonstrates deliberate indifference by Babcock, Morales and Rowley to known, relevant require planning steps." "[t]he absence of team

consideration of: the prior failed adoption, lack of adoptive applicant training and Davis' rigid parent style, and applicant's current financial hardship, reflect reckless disregard by Defendants Babcock, Morales and Rowley."

¶ 28 "Anyone who closed such a report as unfounded would be doing so in deliberate indifference to and in reckless disregard of the child's right to be safe, and in a manner totally contrary to Department regulations and expectations . . . Moringlane . . . either acted without deliberate indifference and reckless disregard in closing the report as unfounded (if that is what he did) or acted with deliberate indifference and reckless disregard in not following up."

¶ 30 "In summary, it is my expert opinion that each of the four Defendants had actual knowledge of the numerous dehydration incidents and knowledge that Omar was abused in the Davis house as indicated by the looped belt marks all over him or, if they did not have actual knowledge of the abuse and neglect, they deliberately ignored or disregarded the evidence of abuse and the foreseeable risk of substantial further harm to Omar and Omar suffered permanent harm as a result."

Those portions of Ms. Radigan's affidavit in which she states what the policies or procedures or rules or regulations of the Department are and which were not followed by Defendants will be considered.

Therefore, the Defendants' motion to strike the affidavit of Linda Radigan is granted in part and denied in part in accordance with this Order.

2. Defendants' Motion to Strike Depositions of Barbara Holmes and Joan Adkins Lindsey

Defendants move to strike the deposition testimony of Barbara Holmes and Joan Adkins Lindsey on the basis of Federal Rule of Civil Procedure 32(a).[12] Plaintiff deposed Barbara Holmes and Joan Adkins Lindsey on March 5, 2002 for the purpose of eliciting testimony in a negligence lawsuit filed against DCF on October 23, 2000. Defendants argue that they were not present or represented at these depositions and had no notice of these depositions. Defendants also contend that since the complaint in the instant case was not filed until July 11, 2002, they had no notice of the need to attend the depositions in the DCF case.

In opposing a motion for summary judgment, the nonmoving party need not produce evidence in a form that would be admissible at trial. *Celotex Corp v. Catrett,* 477 U.S. 317, 324 (1985). Federal Rule of Civil Procedure 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves. A deposition is as good as an affidavit and should be used whenever an affidavit would be permissible, even though the conditions of the rule on the use of a deposition at trial are not satisfied. *Diamonds Plus, Inc. v. Kolber,* 960 F.2d 765, 768 (8th Cir.

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12. Rule 32(a) states that "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof."

1992). Therefore, the Court finds that the depositions of Barbara Holmes and Joan Adkins Lindsey shall be treated as affidavits and shall be considered in opposition to Defendants' motion for summary judgment. The Defendants' motion to strike such depositions is denied.

CONCLUSION

Based on the foregoing, the Court rules as follows:

1. Defendant Raul Moringlane, Jr.'s Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 69) is **GRANTED.**

2. Defendant Bruce Rowley's Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 71) is **GRANTED.**

3. Defendant Cindy Morales' Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 73) is **GRANTED.**

4. Defendant Gloria Babcock's Motion for Final Summary Judgment Based on Qualified Immunity (Doc. No. 75) is **GRANTED.**

5. Defendants' Motion to Strike the Affidavit of Linda Radigan is **GRANTED** in part and **DENIED** in part in accordance with this Order.

6. Defendants' Motion to Strike the Depositions of Barbara Holmes and Joan Adkins Lindsey is **DENIED.**

DONE and **ORDERED** in Chambers in Orlando, Florida this 27th day of August, 2004.

s/ Patricia C. Fawsett
PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT